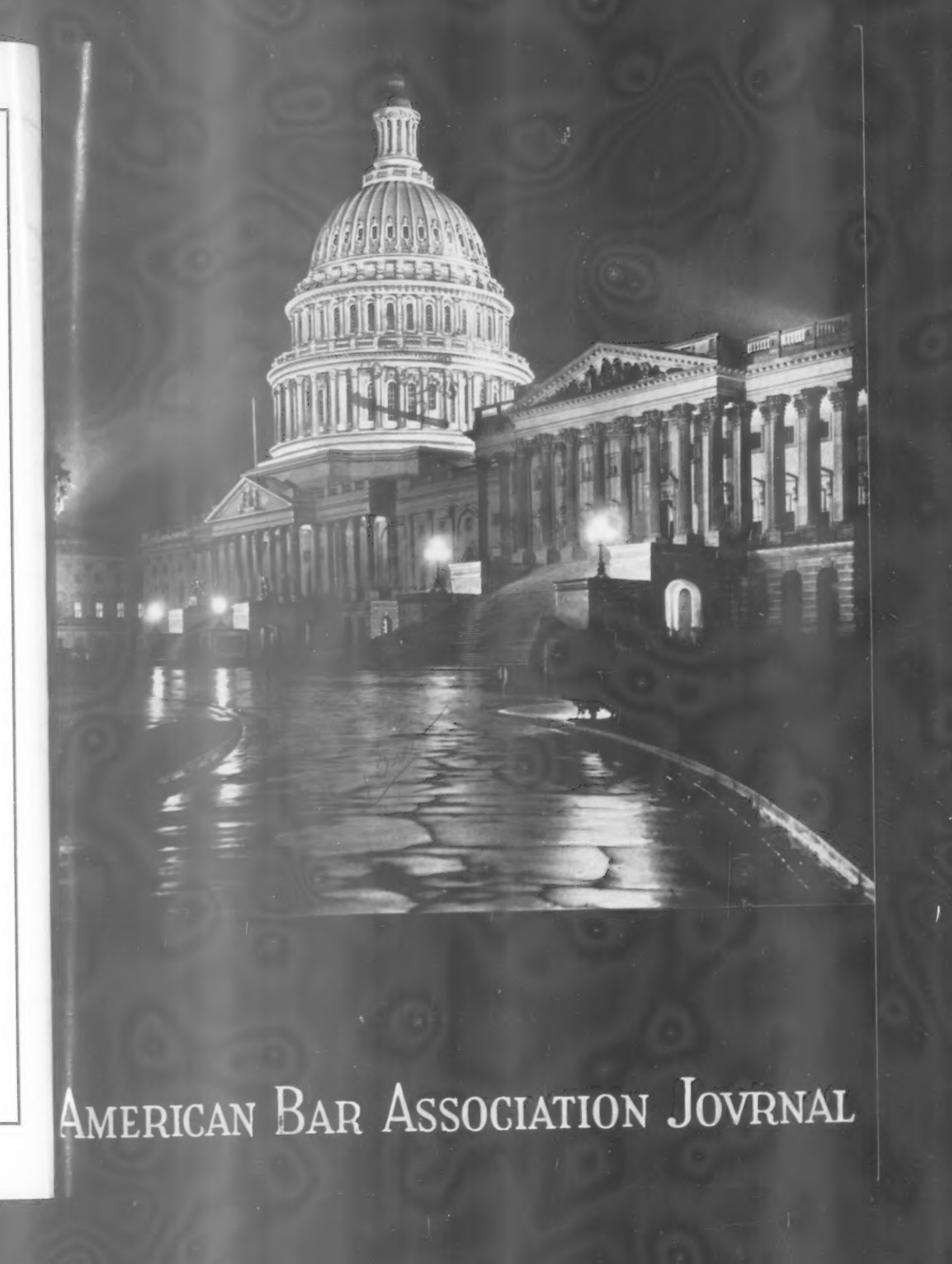

American Bar Association Journal

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Our Cover

Our cover for this issue portrays appropriately the Nation's Capitol, to which the Congress has returned after recess, for deliberation and action on the many momentous problems as to the domestic economy of the United States and American policies in international affairs.

With the ending of the war, the emphasis shifts strongly to the domestic scene and the legislative branch of government, which is prepared to resume its traditional part in the determination of policies and the post-war readjustments of taxes and finances.

Many matters of especial interest to lawyers will be debated and voted on soon in the Nation's historic edifice. American submission to the jurisdiction of the International Court of Justice will be brought to the fore, but the tasks of domestic law-making to shape our internal economy are urgent.

Second Draft of Proposed Amendments FRCP

Helpful and timely are the observations of former President Walter P. Armstrong on the proposed amendments to the Federal Rules of Civil Procedure. A second draft of those amendments has been mailed to all who have heretofore acted as members of bar association committees on the amendments and to those who have participated on their own initiative in this important task. This article should be helpful to the committee which is still working on those amendments and to all others interested in the project.

Prize-Winning Ross Essay

Robert A. Sprecher of Chicago is the winner of the 1945 Ross Essay Award of $3,000. This yearly award was made possible by the bequest of Judge Erskin M. Ross of California, who died in 1928, leaving the Association $100,000 to be invested, the income from which is used as a prize each year for the best essay on a subject chosen at the preceding annual meeting. The purpose which the donor cherished was to promote and insure research for the solution of legal problems.

Mr. Sprecher is a graduate of Northwestern University, former editor-in-chief of the Illinois Law Review, former member of the Board of Editors of the *Chicago Bar Record* and lecturer on war law at DePaul University. He has written a number of articles for law reviews. Mr. Sprecher will receive the award at the annual meeting of the Association in December.

Bar Admission Standards for War Veterans

Joseph A. McClain, Jr., a member of the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association, has contributed to this issue a timely article on a problem of far-reaching importance to the profession: Shall we use bar admission standards so as to render a service or a disservice to those war veterans who desire to enter the legal profession?

"Books for Lawyers"

Walter P. Armstrong has written for our book review department a pungent and provocative review of *The American Language, Supplement I*, by H. L. Mencken. Dr. Charles Prince, Russian expert with the United States Chamber of Commerce, reviews *The Big Three: United States, Britain, Russia*. Several other timely books are noted in the department.

Second Draft of Proposed Amendments to Federal Rules of Civil Procedure

by Walter P. Armstrong
OF THE TENNESSEE BAR

The Advisory Committee on Rules for Civil Procedure has now completed and distributed a second preliminary draft of proposed amendments to the Rules.[1] This second draft is dated May, 1945; but was not available for distribution until the latter part of July. The Committee requests that suggestions reach it by December 1, 1945.

It will be remembered that when the first draft was released it was suggested that the Committee complete its work in time for the Court to promulgate the amendments so that they could be filed at the opening of the present Congress. The Committee wisely did not hurry through its work. Many suggestions were received, considered and discussed at at least two meetings. As a result the first draft has been considerably bettered.

Choices have been made of all the alternative provisions which were submitted to the bench and bar. It is now definitely provided that when, in a case tried without a jury, a motion to dismiss is made at the close of the plaintiff's proof the judge shall pass upon the credibility of the evidence and, if he sustains the motion and dismisses the suit, make a written finding of fact.[2] This ends a conflict in the cases, adopts the sounder rule and is in accord with the increasing weight of authority.

On motions to dismiss for failure to state a claim and for judgment on the pleadings the reception of matters outside the pleadings is left to the Court's discretion. However, if such matters are received the motion shall be treated as one for a summary judgment and dealt with accordingly.[3] This will put a stop to the practice of some courts of treating such motions as "speaking motions," the scope of which is uncertain and the practice on which is unsettled. By tying this practice to the summary judgment rule the right summarily to dispose of a conflict on a material issue of fact is effectually denied.

Finality of Judgments

The question of the finality of judgments is one that has given the Committee much concern. Under the old practice finality was imposed by the expiration of the term. Inequality of operation made that undesirable and the Rules provide that "the period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court."[4]

The rule[5] further provided that within the time allowed or thereafter in cases of excusable neglect the Court might enlarge the time for taking any action except the making of a motion for a new trial, granting a new trial sua sponte and taking an appeal.

Some members of the Committee felt that this did not give sufficient finality to judgments, but, at the time the First Preliminary Draft was issued, the Committee had not agreed on an amendment.[6]

An amendment is now proposed which negatives the power of the Court to extend the time for these purposes: substitution of parties; motion to vacate a judgment and for judgment notwithstanding a verdict; motion to amend the findings and alter the judgment; motion for new trial; granting a new trial sua sponte; motion for relief from a judgment obtained as a result of fraud, surprise, mistake or excusable neglect; taking an appeal; docketing an appeal beyond ninety days from the filing of the notice of appeal.[7]

Most practitioners will probably concur in the Committee's view that the time for doing each of these acts should be fixed and that if the period now allowed is not sufficient the remedy is definitely to enlarge the period by rule rather than to confer upon the Court the unrestricted power to set the rule aside.

For the substitution of parties (two years), substitution of a successor in office (six months), docket-

1. Second Preliminary Draft of Proposed Amendments to Rules of Civil Procedure. For the District Courts of the United States, herein cited as "Second Preliminary Draft".
2. Rule 41 (b) Second Preliminary Draft, pp. 48-51.
3. Rule 12 (b) and (c) Second Preliminary Draft, p. 9.
4. Rule 6 (c). It is proposed to amend this rule by making it read "by the continued existence or expiration of a term of court." Second Preliminary Draft, p. 1.
5. Rule 6 (b)
6. See Armstrong, *Proposed Amendments to Federal Rules of Civil Procedure*, 4 Federal Rules Decisions, p. 124 at pp. 131-135.
7. Rule 6 (a) Second Preliminary Draft, pp. 1-6.

ing an appeal (ninety days maximum) the time allowed is ample. There is no valid objection to the proposed limitation of thirty days for filing a notice of appeal.[8] It is now proposed to fix one year as the time in which a judgment set aside on motion based on specified grounds consisting chiefly of fraud and mistake. As has been pointed out[9] the six months' period was too short, but one year should be sufficient.

The Committee has adhered to its opinion that ten days is ample time within which to move for a judgment notwithstanding a verdict, to amend the findings and alter the judgment or for a new trial.

In so doing it still seems to me that the Committee has failed to take into consideration the situation of the busy practitioner.[10] Other pressing matters compete for attention. A transcript or partial transcript is often needed for the preparation of the motion and more frequently for its proper presentation. Now that the act[11] providing for official stenographers has been implemented by an appropriation, in some districts at least, the difficulty of obtaining transcripts promptly has already been appreciably increased. The bar should make a concerted effort to convince the Committee that the time for making these motions should be extended to thirty days.

Rule Providing for Relief from Judgments Revised

The Committee has produced an excellent revision of the rule providing for relief from judgments,[12] having much broadened it since the First Preliminary Draft. Under the new proposed amendment relief may be obtained "on the following grounds: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . .; (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation or other misconduct of an adverse party." The rule does not limit the power of the Court to entertain an independent action, to set aside a judgment obtained without personal service,[13] or to set aside a judgment for fraud upon the Court.

In the first draft of the amendments the Committee expressed some doubt as to the effect of this rule upon the writ of error *coram nobis* and the bill of review. In view, however, of the broad scope of the present proposed amendment the Committee has properly included a provision abolishing writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of bills of review.

Only in one instance does the Committee seem to have been unable to come to a definite conclusion. In dealing with the extent to which one may delve into an adversary's investigation file and examine statements of witnesses, photographs, maps, etc. procured in preparation for trial the Committee seems to have taken counsel of despair. Both the first and second draft of the amendments allow the Court to order "that designated restrictions be imposed upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the trial of the case."[14]

Admitting the difficulty of the problem the Committee notes that it "is not willing to accept the view that such files are absolutely privileged . . . nor is the Committee willing to accept the view that such files can be delved into in every case." The Committee therefore acts on its belief "that the Courts can be trusted to exercise sound judicial discretion but deplores the fact that the proposed amendment" does not establish any standard for the exercise of judicial discretion. Appealingly it adds: "If members of the profession can formulate a general statement of the standard for exercise of discretion, the Committee will welcome it and give it careful consideration."[15]

Attempted Solution Works for Diversity

This attempted solution neither solves the problem nor makes for uniformity. On the contrary it affirmatively works for diversity. Every practitioner knows that it is already apparent that in dealing with this subject the district judges do not exercise their discretion ruling one way in one case and another in the other case. Rather each adopts an inflexible rule for his own district. It would be far better to refer to "statements of witnesses, surveys, measurements and other documents prepared or obtained by the adverse party in the preparation for the trial of the case" and to declare them to be either privileged or not privileged.

This quandary of the Committee is an illustration of the perplexing problems posed by discovery when its scope is as broad as that contemplated by the Rules. Although the ultimate solution of all of them may have to wait on further experience, measurable progress has already been made.

Interrogatories to parties afford one of the best means yet devised for narrowing the issues. The Committee has now liberalized the first draft by providing that the number of sets of interrogatories is not limited.[16] This is subject to the protective power of the Court and with such limitation is eminently desirable, for the answers to interrogatories included in one set often suggest other interrogatories that are entirely pertinent.

The rule provides that if the party served is " a public or private corporation or a partnership or association" the interrogatories shall be answered "by any officer thereof competent to testify in its behalf."

8. Rule 73, Second Preliminary Draft, pp. 81-84.
9. Armstrong, First Preliminary Draft, Ibid p. 133.
10. Id. p. 133.
11. Public Law 222, 78th Cong. c. 3, 2nd Ses., 28 U. S. #94.
12. Rule 60.
13. U. S. C. Title 28, #118.
14. Rule 30, Second Preliminary Draft, pp. 37, 38.
15. Second Preliminary Draft, pp. 39-40.
16. Rule 33, Second Preliminary Draft, p. 41.

In the case of some large corporations (e.g. railroad companies) no one officer will have sufficient familiarity with the facts to answer all the interrogatories either as of knowledge or on information. All of the facts will, however, be known to the corporation's attorneys before trial. Must the officer make such inquiry as will enable him to supply the answers? If the objective of the Rules is to be obtained the answer must be in the affirmative provided the information is readily accessible in the corporation's files or may be obtained without burdensome expense from employees. The Rules should deal with this contingency, for it is not academic but is constantly arising.

The Rules now permit the taking of depositions or moving for a summary judgment, without leave of Court only after the service of the answer.[17] There is no provision as to when interrogatories to a party can be propounded without leave[18] but it is assumed that they are governed by the deposition practice. The first draft of the amendments did not deal with this phase of the rule as to interrogatories to a party but proposed that depositions could be taken or motion for a summary judgment made any time after the commencement of the action.[19]

The present amendments deal expressly with depositions, interrogatories to a party and motions for summary judgment and provide that in each case action may be taken without leave after the expiration of twenty days subsequent to the commencement of the action.[20]

This is a distinct improvement over the first draft. A plaintiff should not be afforded the opportunity fully to prepare his case before filing suit and then force the defendant to meet such moves before he has had time fully to consider his defense. It would seem, however, that the new proposal would occasionally at least result in an inequality of operation similar to that complained of when the expiration of the term gave finality to a judgment.

The filing of the complaint is the commencement of the action. Without fault a party may not be served until after the expiration of twenty days and may not even learn within that time of the pendency of the suit. Under these circumstances he could without preparation be forced to deal with depositions or confronted with a motion for a summary judgment. Uniformity is easily attainable by permitting such steps without leave only when twenty days have expired since service of the complaint.

The first revision suggested that "the time for a party to plead . . . may be extended by a written stipulation of the parties once without approval of the Court".[21] It was pointed out[22] that this, without the right of the Court to intervene, gave too great latitude to the parties and might result in undesirable delay. The Committee has apparently accepted this view for the sentence is now omitted.[23] This is probably the best course, although it may conceivably work an occasional injustice if other courts follow the holding of the Third Circuit that a party who does not plead within the time prescribed by the Rules is in default, notwithstanding the express agreement of his adversary that he need not do so.[24]

The Committee has now further clarified and bettered the practice of joining in the alternative a motion for new trial with a motion for judgment notwithstanding the verdict. The first draft permitted such joinder and required the district judge to pass on the motion for new trial without prejudice to the motion for judgment. The current revision permits the district judge to decline to rule upon the motion for new trial. If he does conditionally grant or deny the motion for new trial and sustains the motion for judgment and the judgment is reversed on appeal the case shall proceed accordingly unless the appellate court otherwise orders. If the district judge declines to pass on the motion for new trial but sustains the motion for judgment and this is reversed on appeal he shall then rule on the motion for new trial unless the appellate court otherwise orders.[25]

There seems to be room for improving the rule that permits certain defenses to be made by motion.[26] It is expressly provided that no defense is waived by being joined with other defenses either in a responsive pleading or in a motion. But suppose that a motion is filed to dismiss for insufficiency of service of process and, before the motion is heard, an answer on the merits is filed: Is the motion waived? The question has arisen and the Rules do not answer it.

Defenses which may be made by motion are: Lack of jurisdiction over the subject matter or person; improper venue; insufficiency of or of service of process; failure to state a claim or to join an indispensable party. A motion may also be made for a more definite statement. Whenever a party makes a defense by motion he must join all other defenses permitted by motion then available. If he fails to do so he may not thereafter make any of these defenses by motion and entirely waives all except failure to state a claim, to join an indispensable party or lack of jurisdiction which defenses may be later interposed in another manner.

All of the defenses permitted by motion except that to make more definite and to dismiss for failure to state a claim are in a sense preliminary—challenges to the plaintiff's right to get his foot in the court room door. They fall into an entirely different category from a motion to make more definite or a motion to dismiss for failure to state a claim. If one of these motions,

17. Rules 26 and 56.
18. Rule 33.
19. First Preliminary Draft, pp. 37-40; 66-68.
20. Second Preliminary Draft, pp. 31-35; 40-45; 64-66.
21. First Preliminary Draft, p. 11.
22. Armstrong, Proposed Amendments etc. Ibid p. 128.
23. Rule 12 (a) Second Preliminary Draft, pp. 7-8.
24. *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.* 3 Cir., 1942, 130 Fed. (2d) 185.
25. Rule 50, Second Preliminary Draft, pp. 54-58.
26. Rule 12 (b).

which challenge the plaintiff's right to proceed, is sustained the Court will find it unnecessary to take up the motion to dismiss for failure to state a claim and will often be relieved from deciding intricate questions of law.

A motion for a more definite statement is frequently necessary before a motion to dismiss because no claim is stated can be made. A complaint may state a case on a contract which is within the Statute of Frauds and fail to state whether or not it is in writing. A motion to make more definite will elicit this fact and prepare the way for a motion to dismiss if the contract is oral.

The better practice would seem to be to require the motions which challenge venue or jurisdiction to be joined and first made, next to permit a motion to make more definite and and then a motion to dismiss. If when the complaint is made definite it does not state a case there is no reason why the case should not then be disposed of on a simple motion to dismiss rather than later by motion for judgment on the pleadings or at the trial.

I am still unreconciled to the idea of the clerk entering a judgment especially upon an accepted offer by a party.[27] This practice if it is allowed will be pregnant with possible future embarrassment to the Court. This, however, is probably not serious as a practical matter, for few judges will permit the clerk to enter, without their approval, such a judgment except one for dismissal or for a sum certain. Indeed, in many districts the practice is for the judge, notwithstanding the Rules, to require all judgments to be submitted to him for approval.

The Committee has not revised the proposed amendment permitting the liability of a surety or an injunction bond to be fixed on motion by expressly declaring that the giving of this right does not negative recourse to an independent action.[28] This is no doubt the meaning of the rule as the right to proceed by motion is permissive. However, it is difficult to understand why the Committee, when giving the permissive right to have a judgment set aside on motion for fraud, mistake, etc., thought it advisable expressly to confirm the right to an independent action;[29] and did not take the same view in regard to proceedings on injunction bonds.

A minor ambiguity also results from the fact that one rule makes it the duty of the clerk in many cases to enter judgment without any direction,[30] while another requires the clerk when preparing the record on appeal always to include "the direction for the entry of judgment.[31]

Condemnation of Property for Public Use

The most serious objection to the present draft is the failure to include a rule settling the procedure for the condemnation of property for public use. It was unfortunate that this subject was not originally embraced in the Rules.[32] The lack of uniformity in the Federal practice is indefensible. There is a maze of diversity resulting from the fact that differing Federal statutes prescribe the procedure in many cases while in others there is conformity to state practice. So long as this condition exists there will be no real uniformity in Federal procedure.

In the first draft of amendments the Committee attempted to deal with this subject.[33] The proposed rule was not satisfactory. It excepted proceedings under the Tennessee Valley Authority Act[34] and did not apply to the District of Columbia[35] or to proceedings under state constitutions or laws and removed to the Federal Court. It thus did not attempt fully to deal with the subject. Moreover, the proposed rule was extensively and vigorously criticized by the bar as being somewhat summary and too much a reflection of the point of view of the condemnor.

In giving its reason for withdrawing the proposed rule the Committee says that it "has not been able to prepare a revised draft of a condemnation rule satisfactory to it which would meet legitimate objections made to the original draft, and at the same time be acceptable to the government agencies dealing with condemnation cases."[36] One of the reasons given in the first draft for excluding procedure under the Tennessee Valley Authority Act from the proposed rule was that "the TVA authorities, well satisfied with their procedure, vigorously protest any change."[37]

To some it will seem that if there is to be a delay until a rule is formulated which is acceptable to all the government agencies concerned there will be no such rule within the foreseeable future.

This in fact is a singularly appropriate time for settling such a rule. As a result of the enormous number of condemnation suits filed in connection with war activities, more lawyers (both government attorneys and those in private practice) and more judges have had experience in this type of case than ever before in our history. There

(Continued on page 533)

27. Rules 58 and 68.

28. Rule 65, Second Preliminary Draft, pp. 75-76.

29. Rule 60, Second Preliminary Draft, pp. 69-74.

30. Rule 58.

31. Rule 75 (g). Clarification suggests the insertion of "if any" after "judgment."

32. The Committee in the April, 1937, draft proposed a condemnation rule, Rule 74. See Moore's *Federal Practice Under the New Federal Rules*, Vol. 3, p. 3719. Owing to a lack of interest on the part of the Department of Justice the proposed rule was stricken from the Committee's final report.

33. Rule 71A. First Preliminary Draft, pp. 79-93.

34. 16 U.S.C.A. #831 et seq.

35. 40 U.S.C.A. #361-386.

36. Second Preliminary Draft, p. 80.

37. First Preliminary Draft, p. 96. The T. V. A. Act provides for what is probably the most cumbersome and expensive condemnation procedure yet devised. I have discussed the procedure with many of the judges who have tried these cases and to this they agree. Under the Act three commissioners fix the compensation; three district judges pass de novo on their report; the Circuit Court of Appeals on the record fixes the compensation "without regard to the awards or findings theretofore made by the commissioners or the district judges." 16 U.S.C.A. #831 et seq.

1945 Prize-Winning Ross Essay

The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied

by Robert A. Sprecher

OF THE ILLINOIS BAR

In 1921, Mr. Justice Cardozo observed that "in these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether."[1] Nearly twenty-five years later, Mr Justice Roberts announced in dissenting opinions of the Supreme Court of the United States that the rule had been virtually abandoned:[2]

> The tendency to disregard precedents . . . has become so strong in this Court of late as . . . to shake confidence in the consistency of decision and leave courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow . . .
>
> * * *
>
> . . . the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only.

The percentage of deciding opinions against which dissenting opinions were filed increased from sixteen per cent for the six terms from the 1931-32 term through the 1936-37 term, to thirty-three per cent for the six terms of 1937-38 through 1942-43.[3] In the 1942-43 term, dissents were filed against forty-four per cent of all deciding opinions,[4] and in the 1943-44 term against sixty-three per cent.[5] "The reorganized Supreme Court has become by far the most badly divided body in the history of that institution."[6]

For these and other reasons indicating a growing instability in our highest tribunal[7] – an instability which filters down to the lower courts –it has become pertinent to determine the extent to which the doctrine of stare decisis should be applied in the American system of law. In order to make any informed determination, it is first necessary to ascertain the meaning, nature and scope of the doctrine as developed in English and American law.

I

The doctrine of *stare decisis et non quieta movere*, "to stand by the decisions and not to disturb settled points," developed during "the infancy of our law."[8] Historians agree that Bracton's *Note Book*, containing one of the first collections of English decisions, gave early impetus to the doctrine.[9] Bracton did not understand the modern implications of stare decisis, but he directed the attention of the legal profession to

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1. Cardozo, *The Nature of the Judicial Process* (1921) 149. See also, Holland *The Elements of Jurisprudence* (11th Ed., 1916) 70. "The views range all the way from the more moderate suggestion of slight modification to the radical demand for the complete abolition of stare decisis." Goodhart, "Case Law in England and America" (1930) 15 Corn. L. Q. 173, at 181.

2. *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96 (1944) at 113 (Mr. Justice Frankfurter concurring in dissent); *Smith* v. *Allwright*, 321 U. S. 649 (1944) at 669.

3. Pritchett, "The Coming of the New Dissent: The Supreme Court, 1942-43" (1943) 2 U. of Chi. L. Rev. 49, at 49-50.

4. *Ibid.*, at 50.

5. 13 U. S. Law Week 3021-2 (1944).

6. Pritchett, *op. cit. supra* n. 3, at 49.

7. In a patent infringement case, *Mercoid Corporation* v. *Mid-Continent Inv. Co.*, 320 U. S. 661 (1944), Mr. Justice Black, in a concurring opinion joined in by Mr. Justice Murphy, charged Mr. Justice Frankfurter with "interpreting legislative enactments on the basis of a court's preconceived views on 'morals' and 'ethics'." (672) In a public utility rate case, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944), Justices Black and Murphy, in a concurring opinion, charged Frankfurter with making "a wholly gratuitous assertion as to Constitutional law." (619)

The classic example of recent Supreme Court instability has been the flag salute cases involving Jehovah's Witnesses. In *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), a Pennsylvania board of education regulation requiring public school children to salute the American flag was held to be constitutional. Frankfurter's majority opinion was concurred in by Hughes, McReynolds, Black, Douglas, Murphy, Reed and Roberts; Stone dissenting. Hughes and McReynolds later retired from the Court and in *Jones* v. *Opelika*, 316 U. S. 584 (1942), Black, Douglas and Murphy, in a dissenting opinion, expressed their belief that the *Gobitis* decision was wrong. In *Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251 (S. D. W. Va., 1942), a similar West Virginia regulation was held to be unconstitutional by the Federal District Court despite the *Gobitis* case which, though not overruled, was declared not controlling. When the *Barnette* case reached the Supreme Court, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), the *Gobitis* case was expressly overruled and the lower court's prediction proved to be correct. Jackson's majority opinion was concurred in by Stone, Black, Douglas, Murphy, and Rutledge; Frankfurter, Roberts and Reed dissenting. "Construed to justify departure whenever known minority views plus a change in personnel create a mere possibility of overruling, [the lower court's action] represents a serious inroad upon the principle of stare decisis." Note (1943) 56 Harv. L. Rev. 652, at 654.

For examples of public reaction to Supreme Court uncertainty, see Chamberlain, "The Nine Young Men" (Jan. 22, 1945) *Life Magazine*, Vol. 18, No. 4; Kilpatrick, "Supreme Court Dissension Follows No Fixed Pattern" (Mar. 13, 1944) *The Chicago Sun*.

8. Kent, *Commentaries* (Lacy's Ed., 1889) 477.

9. Winfield, *Chief Sources of English Legal History* (1925) 147; Pound, *Readings on the History and System of the Common Law* (1921) 98-9; Shroder, "The Doctrine of Stare Decisis" (1904) 58 Cent. L. J. 23, at 24. The period of decisions covered by the *Note Book* is approximately 1217-1240. Henry de Bracton, a Judge of Assize during the reign of Henry III, obtained access to the Plea Rolls through his judicial position.

past decisions in "an attempt to bring back the law to its ancient principles."[10] The first comprehensive law reports, the *Year Books*, not only constituted in and of themselves evidence of the importance of prior decisions,[11] but they also contained progressively frequent reference to earlier cases and often a direct statement that certain cases were of some authority, such as the words of Chief Justice Priscot in 1454: "If this plea were now adjudged bad, as you maintain, it would assuredly be a bad example to the young apprentices who study the *Year Books*, for they would never have confidence in their books if now we were to adjudge the contrary of what has been so often adjudged in the Books."[12]

Sir William Holdsworth has pointed out that the modern theory of stare decisis began to develop at the end of the fifteenth century when the changes in the system of pleading "concentrated the reporter's attention, not upon the oral debate in court as to what the pleading should be and what issue should be reached, but upon the decision of the court upon an issue reached by the written pleadings of the parties before the case had come into court."[13] In Dyer's and Plowden's Reports prior cases are referred to extensively,[14] and "with Lord Coke the citation of cases reached a height which it has never equalled since."[15] In his great *Commentaries*, written in 1765, five hundred years after Bracton's *Note Book*, Blackstone was able to say that "it is an established rule to abide by former precedents, where the same points come again in litigation."[16] The modern doctrine of the authority of decided cases was reached substantially by the end of the eighteenth century.[17]

Under the modern doctrine, "a judicial precedent speaks in England with authority."[18] "It is more than a model; it has become a fixed and binding rule."[19] *Absolute authority* is said to exist in the following cases:

1. Every court is absolutely bound by the decisions of all courts superior to itself, and usually of all courts of coordinate juridiction.[20]

2. The House of Lords is absolutely bound by its own prior decisions.[21]

3. The Court of Appeal is probably bound by its own decisions, although there is some doubt.[22]

However, Holdsworth has observed that the theory of precedents has been accepted in England only subject to reservations and conditions which modify its seemingly unyielding effect. The three important reservations and conditions, all of which ultimately rest on the

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10. Plucknett, *A Concise History of the Common Law* (1929) 181, 303.

11. Holdsworth, "Case Law" (1934) 50 L.Q. Rev. 180, at 181: "If they had not been regarded as being of some authority it would be difficult to see what value the Year Books would have been to the legal profession." Winfield, *op. cit. supra* n. 9, at 148: "And here, if anywhere, it might be thought that law reporting begins." The period of decisions covered by the *Year Books* is from Edward I to Henry VIII (about 1292-1535). For extracts from the Year Books, see Pound, *op. cit. supra* n. 9, at 99-100.

12. Y. B. 33 Hen. VI, 41. Quoted in Plucknett, *op. cit. supra* n. 10, at 306; cited in Kent, *op. cit. supra* n. 8, at 477; Holdsworth, *op. cit. supra* n. 11, at 181; Shroder, *op. cit. supra* n. 9, at 24.

13. Holdsworth, *op. cit. supra* n. 11, at 181.

14. Plucknett, *op. cit. supra* n. 10, at 307; Winfield, *op. cit. supra* n. 9, at 157: "It has been pointed out that in the first ten cases in Plowden's Reports about thirty cases are cited and stated as authority by court and counsel." The period of King's Bench decisions covered by Dyer's Reports are 1513-1582, and by Plowden's Reports are 1550-1580.

15. Gray, *Nature and Sources of Law*, Sec. 459, quoted by Holdsworth, *op. cit. supra* n. 11, at 182. See also, Plucknett, *op. cit. supra* n. 10, at 307-8. The period of King's Bench decisions covered by Coke's Reports is 1572-1616. The King's Bench Reports of Croke (1582-1641), Winfield, *op. cit. supra* n. 9, at 157, the King's Bench Reports of Hobart (1603-1625) and the later Exchequer Reports of Jenkins (1220-1623), Holdsworth, *op. cit. supra* n. 11, at 182, also contained a wealth of cited precedents. Chief Justice Vaughan, whose Common Pleas Reports cover the period 1665-1674, is credited with aiding substantially in the development of the doctrine. See *Bole* v. *Horton* (1670) Vaughan, 360, at 382; Plucknett, *op. cit. supra* n. 10, at 308.

16. Blackstone, *Commentaries* (Cooley's 3rd Ed., 1884) at 69.

17. Holdsworth, *op. cit. supra* n. 11, at 180. *Cf.* Plucknett, *op. cit. supra* n. 10, at 308: "It is only in the nineteenth century that the present system of case law with its hierarchy of authorities was established."

18. Goodhart, *op. cit. supra* n. 1, at 175-6, quoting Sir John Salmond, and adding: "This unqualified statement of the binding nature of a precedent has, as far as I know, not been questioned by a single English authority."

19. Goodhart, "Precedent in English and Continental Law" (1934) 50 L. Q. Rev. 40, at 41.

20. *Ibid.*, at 41-2: "A superior Court is never bound by the decisions of the lower Courts, although, if a general practice has developed in these Courts, the superior Court will hesitate to depart from it, nor will it, as a rule, reverse a case which has been generally accepted as a model by the Bar. Nor is one Court of first instance bound by the decision of another Court of similar jurisdiction, although it will pay it great respect." However, with the exception of courts of first instance, a decided case generally binds courts of coordinate jurisdiction. Holdsworth, *op. cit, supra* n. 11, at 180.

21. *Attorney-General* v. *Dean and Canons of Windsor* (1860) 8 H. L. C. 369, at 391-2; *London Street Tramways Co.* v. *London County Council* (1898) A. C. 375, at 379; Pollock, *A First Book of Jurisprudence* (3rd Ed., 1911) 327-334, at 334: "No other court of last resort has gone quite so far, it is believed, in disclaiming power to correct itself."

22. Goodhart, *op. cit. supra* n. 19, at 42; Pollock, *op. cit. subra* n. 21, at 316.

declaratory theory of law, which is "the principle stated by Coke, Hale and Blackstone, that these cases do not make law, but are only the best evidence of what the law is,"[23] are: (1) the rule laid down in a case need not be followed if it is "plainly unreasonable and inconvenient" – that is, if it is obviously contrary to a statute or to well established principle;[24] (2) a judge has some freedom of choice in instances where courts of equal authority have handed down conflicting decisions; and (3) the authority of a decision is attached, not to the words used, nor to all the reasons given, but to the principle or principles necessary for the decision of the case.

The American doctrine of stare decisis approximated the English doctrine until the twentieth century and the advent of the socialization of the law, but "the modern and present trend is characterized by the overruling and distinguishing of precedents to an extent that would strike an English judge and lawyer as revolutionary."[25]

The American doctrine has always embraced the three conditions of the English doctrine to the effect that erroneous decisions should be corrected,[26] that conflicting precedents permit judicial choice,[27] and that the ratio decidendi and not dicta constitutes authority,[28] but it has developed two additional conditions, foreign to English law, which are indeed revolutionary and which introduce an element of flexibility into the doctrine.

In the first place, the English doctrine of precedents is a policy voluntarily but rigidly accepted by courts of last resort to effectuate stability in the legal system, and it is enforced by those courts on lower courts in the system through the appeals procedure. The Supreme Court of the United States, on the other hand, has declared that whether stare decisis "shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question"[29] and, as Kent has said, "the revision of a decision very often resolves itself into a mere question of expediency."[30] Thus "the proper American conception comprehends stare decisis as a flexible doctrine."[31] In place of the English hierarchy of absolute authority outlined above, the more flexible American doctrine functions approximately as follows:

1. The Supreme Court has never held itself to be rigidly bound by its own decisions, and other federal and state courts have followed that course in reference to their own decisions.[32]

2. A decision of the United States Supreme Court is binding on federal matters on all other courts, federal or state.[33]

3. While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding since the state court owes obedience to only one federal court, namely, the Supreme Court. The converse is also true; a decision of a state court on a federal matter may be persuasive in the federal courts but it is not binding.[34]

4. Decisions of the federal courts (other than the Supreme Court) are not binding upon other federal courts of coordinate rank, or of inferior rank, unless the latter owe obedience to the court rendering the decision.[35]

The most important aspect of the flexibility of the American doctrine has been the attitude of the Supreme Court of the United States in cases

23. Holdsworth, *op. cit. supra* n. 11, at 184. The view that decisions are merely *evidence* of what the law is has been supplanted somewhat by the view that court decisions *constitute* the law. Carpenter, "Court Decisions and the Common Law" (1917) 17 Col. L. Rev. 593; Goodhart, *op. cit. supra*. n. 19, at 44. Cardozo has taken a third view that court decisions *and* statutes constitute law. Cardozo, *op. cit. supra* n. 1, at 124 et seq.

24. Baron Parke in *Mirehouse* v. *Rennell* (1833) 1 Cl. & Fin. at 546. This goes somewhat beyond Blackstone. *op. cit. supra* n. 16, at 69-70: "Yet this rule [of stare decisis] admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law." Holdsworth also lists as a condition the fact that a judge can contradict a report by resorting to a more accurate report. Holdsworth, *op. cit. supra* n. 11, at 187-8. This condition survives from the eighteenth century when several private reporters would often report a case.

25. Kocourek and Koven, "Renovation of the Common Law Through Stare Decisis" (1935) 29 Ill. L. Rev. 971, at 976.

26. Kent, *op. cit. supra* n. 8, at 477: "It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance." See also, *Wood* v. *Brady*, 150 U. S. 18 (1893) at 23; *Neff* v. *George*, 364 Ill. 306, 4 N. E. (2d) 388 (1936) at 309.

27. See *Wurzler* v. *Clifford*, 36 N. Y. S. (2d) 516 (Sup. Ct., Spec. Term, Kings County, 1942) at 518.

28. "It is well settled that dicta in an opinion do not have any binding authority." Kocourek and Koven, *op. cit. supra* n. 25, at 979.

29. *Hertz* v. *Woodman*, 218 U. S. 205 (1910) at 212. The court there held that "the Circuit Court of Appeals was obviously not bound to follow its own prior decision." See also, *Otter Tail Power Company* v. *Von Bank*, 8 N. W. (2d) 599 (N. D., 1942) at 607; *Park Construction Company* v. *Independent School District No. 32*, 209 Minn. 182, 296 N. W. 475 (1941) at 478 (stare decisis is "a guiding policy, not inflexible rule"); *Brown* v. *Rosenbaum*, 175 Misc. 295, 23 N. Y. S. (2d) 161 (Sup. Ct., Trial Term, N. Y. County, 1940) at 171 (stare decisis is "not a rule of compulsion but one of deference to precedent"); *People* v. *Graves*, 242 App. Div. 128, 273 N. Y. S. 582 (Sup. Ct., App. Div., 3rd Dept., 1934) at 591 ("obligation imposed upon the courts by the doctrine of stare decisis is a moral obligation only").

30. Kent, *op. cit. supra* n. 8, at 477.

31. Von Moschzisker, "Stare Decisis in Courts of Last Resort" (1924) 37 Harv. L. Rev. 409, at 414-5: "The degree of control to be allowed a prior judicial determination depends largely on the nature of the question at issue, the circumstances attending its decision, and perhaps, somewhat on the attitude of individual participating judges."

32. Moore and Oglebay, "The Supreme Court, Stare Decisis, and Law of the Case" (1943) 21 Tex. L. Rev. 514, at 525; Cardozo, *op. cit. supra* n. 1, at 158. See also, for list of cases overruled by the United States Supreme Court, the dissenting opinion of Mr. Justice Brandeis in *Burnet* v. *Coronado Oil & Gas Company*, 285 U. S. 393 (1932) at 406-9, footnotes 1, 2 and 4, and *Helvering* v. *Griffiths*, 318 U. S. 371 (1943) at 401, footnote 52.

33. Moore and Oglebay, *op. cit. supra* n. 32, at 525.

34. *Ibid.*, at 525: "Even in the days when *Swift* v. *Tyson* allowed the Supreme Court to determine for itself, and other federal courts, a vast amount of local law, it could not and did not compel obedience in the state courts to its conception of state law. Now, in the light of the *Tompkins* case on a non-federal matter, the federal courts must follow state law, whether statutory or case-made, and, as pointed out, the effect of state precedent in the federal court is apt to become far more rigid and binding than in the court which establishes the precedent—in fact, the effect of the precedent approaches that of res judicata." *Ibid.*, at 524: "While the decisions of one state may be persuasive in another state, they are not binding precedents in the latter."

35. *Ibid.*, at 524: "A decision of one district court is not binding upon a different district court; and while a district court must follow a decision of its court of appeals, it is not bound to follow a decision of a court of appeals of another circuit. And it is common knowledge that the decisions of the court of appeals for one circuit are not binding upon the court of appeals for other circuits, but instead the possibility of conflict is anticipated and made a ground for *certiorari*." *Cf. Forstmann* v. *Rogers*, 35 F. Supp. 916 (D. N. J., 1940) a 918, and *G. E. Employees Securities Corporation* v. *Manning*, 42 F. Supp. 657 (D. N. J., 1941) at 662.

involving the Federal Constitution, where correction through legislative action is practically impossible.[36] The Court has often overruled its earlier constitutional decisions, and particularly so when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle iself.[37].

The second revolutionary difference between the English and American theories of stare decisis is the adaptability of the latter to "the spirit of the times."[38] The American doctrine is fully sensitive to social, economic, and political evolution or change.[39] The fact that, consistent with the American doctrine of stare decisis, the judge functions in part as a law-maker is accepted in America as "one of the existing realities of life."[40]

The discretionary application of the American doctrine furnishes the means of flexibility and the adaptability of the doctrine to the times furnishes some standard of flexibility. However, if flexibility were the only concern of a legal system, stare decisis, which is primarily an organ of stability, would be a useless appendage.

II

Clearly the first step in determ ning the extent to which the doctrine of stare decisis should be applied is to decide whether the doctrine is to be applied at all, and the answer to that question has largely been supplied by the history of the development of our legal system. The functional definition of law furnished by the sociological jurists[41] has served to emphasize that the science of law, like the other sciences, is a search for probability rather than a search for certainty. Cardozo has expressed it well: "The more we study law in its making, at least in its present stages of development, the more we gain the sense of a gradual striving toward an end, shaped by a logic which, eschewing the quest for certainty, must be satisfied if its conclusions are rooted in the probable."[42]

Lacking universal truths to serve as the ultimate source of judgment, a legal system is faced with the alternatives of permitting judges to function arbitrarily and according to individual whim or impulse, or of imposing upon judges from without some objective standard. The decision is not a difficult one. Even the earliest judges, the Homeric kings, unwilling to admit that they were unfettered in their judgments, pointed to divine inspiration as their source of law, and when they were superseded by a juristical aristocracy to whom the knowledge of the laws was confided from generation to generation, a true objective standard was imposed upon the judges—a standard defined by tribal customs.[43] Throughout the history of legal systems there is a constant shifting between subjective and objective judging. Anglo law became committed to the objective method when Sir Edward Coke reminded James I that the medieval doctrine of the supremacy of the law took precedence over the divine right of monarchy by quoting to him the words of Bracton: "The King is subject not to men, but to God and the law."[44] The political philosophy of a government of laws rather than of men was embodied in

36. In England "one act of legislature is a cure of a bad law sufficient for a nation." Shroder, *op. cit. supra* n. 9, at 24. "Parliament is free to correct any judicial error; and the remedy may be promptly invoked." *Burnet* v. *Coronado Oil & Gas Company*, 285 U. S. 393 (1932) at 410. The difference between the English and American application of stare decisis to constitutional questions may be partly explained by the fact that the English Constitution consists of detailed statutory and case law while the American Constitution consists of a single document containing broad principles, similar to a continental code. See Dicey, *Introduction to the Study of the Law of the Constitution* (6th Ed., 1902) at 4-6, 22-3.

37. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393 (1932) at 406-7, 410. Mr. Justice Brandeis said at page 409, footnote 5: "The policy of stare decisis may be more appropriately applied to constitutional questions rising under the fundamental laws of those states whose constitutions may be easily amended . . . In only two instances —the Eleventh and the Sixteenth Amendments—has the process of constitutional amendment been successfully resorted to, to nullify decisions of this Court. See *Chisholm* v. *Georgia*, 2 Dall. 419; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601. It required eighteen years of agitation after the decision in the *Pollock* case to secure the Sixteenth Amendment." For list of cases where the United States Supreme Court overruled itself upon constitutional questions, see *Smith* v. *Allwright*, 321 U. S. 649 (1944) at 665-6, footnote 10. On the other hand, the doctrine of stare decisis has been more strictly applied in America in cases where contract and property rights have been settled in reliance upon decided cases, and in criminal cases. Von Moschzisker, *op. cit. supra* n. 31, at 415-19.

38. Chamberlain's classic definition of the American theory contains this proviso, "but the degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible." Chamberlain, *Stare Decisis* 19. See also, *State* v. *Mellenberger*, 163 Ore. 233, 95 P. (2d) 709 (1939), at 719-20.

39. Kocourek and Koven, *op. cit. supra* n. 25, at 977-8; Hardman, "Stare Decisis and the Modern Trend" (1926) 32 W. Va. L. Q. 163, at 165-6, 191; Cardozo, *op. cit. supra*, n. 1, at 98 et seq; *Carroll* v. *Local No. 269*, 133 N. J. Eq. 144, 31 A. (2d) 223 (1943) at 225.

Recent examples of the sensitivity of American law to war conditions are the flag salute cases, *supra* n. 7, and the American-Japanese regulation cases: *Cf. Hirabayashi* v. *United States*, 320 U. S. 81 (1943) and *Korematsu* v. *United States*, 65 S. Ct. 192 (1944) with *Ex Parte Endo*, 65 S. Ct. 208 (1944). It remains to be decided whether these groups of cases indicate a disregard for the need for stability or merely a response to the need for flexibility.

40. Cardozo, *op. cit. supra* n. 1, at 10; Stone, "The Common Law in the United States" (1936) 50 Harv. L. Rev. 4, at 20; Waite, "Judge-Made Law and the Education of Lawyers" (1944) 30 A.B.A.J. 253.

41. Holmes, *Collected Legal Papers* (1921) 173: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Cardozo, *The Growth of the Law* (1924) 44: "We shall unite in viewing as law that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or in future controversies."

42. Cardozo, *op. cit. supra* n. 41, at 70. *Cf.* Cook, "The Logical and Legal Bases of the Conflict of Laws" (1924) 33 Yale L. J. 457-8: "In the field of the physical sciences, therefore, the deductive method of ascertaining the truth about nature has given way to what is called—perhaps with not entire accuracy—the inductive method of modern science, in which the so-called 'laws of nature' are reached by collecting data, i. e. by observing concrete phenomena, and then forming, by a process of 'trial and error,' generalizations which are merely useful tools by means of which we describe in mental shorthand as wide a range as possible of the observed physical phenomena, choosing that form of description which on the whole works most simply in the way of enabling us to describe past observations and to predict future observations." Application of the physical science method to the law is suggested in Oliphant, "A Return to Stare Decisis" (1928) 14 A. B. A. J. 71, at 76. Oliphant believes that the multiplication of cases is good rather than bad because the science of law must rest on the observation of cases, and the more cases the more accurate the observation.

43. Maine, *Ancient Law* (1st American Ed., 1867) 4, 9-12.

44. Plucknett, *op. cit. supra* n. 10, at 49.

the Constitution of the United States and became a living doctrine in the decisions of Chief Justice Marshall.[45] Cardozo recognized that "the destruction of all rules and the substitution in every instance of the individual sense of justice" might result in "a benevolent despotism if the judges were benevolent men" but " it would put an end to the reign of law."[46]

Once it has been decided that judges are to be restricted in their function of judging by some objective standard, the next problem is to select a standard. The standard must be one which compromises progress and stability.[47] "Law must be stable, and yet it cannot stand still."[48] "Two distinct tendencies, pulling in different directions, must be harnessed together and made to work in unison."[49] "Somewhere between worship of the past and exaltation of the present, the path of safety will be found."[50] In civil law the instrument of stability is the code; in common law the instrument of stability is the doctrine of stare decisis. In civil law the means of progress have been the courts in applying the general principles of the code to individual cases; in common law the means of progress have been the legislatures in amending old statutes and creating new ones, and, in the American system, the courts in making judge-made law to fill the gaps between statutory law and between precedents, and in overruling outmoded precedents. Speaking very generally, continental law has intrusted stability to the legislature and progress to the judiciary, while Anglo-American law has intrusted stability to the judiciary and progress to the legislature.[51]

Therefore, in the absence of a code, stare decisis, in one form or another, provides the necessary standard of stability in the common law and without it there would be no real system of law whatever.[52]

Debate over whether a code should supplant the doctrine of stare decisis in American law is not profitable since "whatever its defects, the system, deep rooted in our tradition and habit of mind, after serving us for some six centuries, will not be discarded,"[53] and since seemingly insurmountable constitutional questions would be encountered. Furthermore, the American doctrine of stare decisis is a device for stability with qualities of the strict doctrine of precedents and qualities of the civil law without being either.[54]

Since stare decisis is an inevitable doctrine in American common law, how far and in what manner should it be applied? In this connection it will be helpful to examine the beneficial results which flow from the application of the doctrine.[55]

Stare decisis is the instrument of *stability* in a legal system.[56] The concept of stability has several important ramifications which may be considered as separate beneficial results of the application of the doctrine, although each is an aspect of stability and each merges almost imperceptively into the next.

Stare decisis furnishes a legal system with *certainty* and *predictability*.[57] It enables lawyers to advise their clients with a reasonable degree of confidence that certain acts will produce certain consequences. The accuracy with which lawyers can predict legal results measures the esteem with which the legal profession is regarded by the public. Stare decisis enables all members of society to chart and plan future conduct with reasonable knowledge of the risks involved and the probable results to be obtained.

Stare decisis clothes a legal system with *reliability*. When individuals have relied upon authoritative rules of conduct, they are assured that those rules will not be changed so as to make past conduct illegal. Without adherence to precedent, property and contract rights would never be settled. "Our common-law process would become the most intolerable kind of *ex post facto* judicial lawmaking."[58] "But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."[59]

45. See, for example, *Marbury* v. *Madison*, 5 U. S. 137 (1803).

46. Cardozo, *op. cit. supra* n. 1, at 136. *Cf.* at page 106: "A jurisprudence that is not constantly brought into relation to objective or external standards, incurs the risk of degenerating into what the Germans call 'Die Gefuhlsjurisprudenz,' a jurisprudence of mere sentiment or feeling."

47. Cardozo, *Paradoxes of Legal Science* (1928) 6: "Rest competes with motion, permanence with flux, stability with progress."

48. Pound, *Interpretations of Legal History* (1923) 1.

49. Cardozo, *op. cit. supra* n. 41, at 2.

50. Cardozo, *op. cit. supra* n. 1, at 160.

51. Henry, "Jurisprudence Constante and Stare Decisis Contrasted" (1929) 15 A. B. A. J. 11; Lambert and Wasserman, "The Case Method in Canada and the Possibilities of its Adaptation to the Civil Law (1929) 39 Yale L. J. 1, 14. The doctrines of *jurisprudence constante* in the civil law and stare decisis in the common law are comparable to some extent, but in the civil law "the emphasis is not on the individual case in particular, but rather on a series or group of cases creating a practice." Goodhart, *op. cit. supra* n. 19, at 42.

52. Lile, "Views on the Rule of Stare Decisis" (1916) 4 Va. L. Rev. 95, at 97: "Under the common law system, however, lacking as it does a scientifically constructed code as a basis, or, indeed, any code in a true sense, we are *ex necessitate* more dependent on the influence of previous decisions. If we strip these of all mandatory force, our unwritten law would be evidenced by no authoritative declaration, and every court, from the lowest to the highest, would be law unto itself. The rule of *stare decisis* is, therefore, a rule of necessity and a natural evolution from the very nature of our institutions." See also, Henry, *op. cit. supra* n. 51, at 12.

53. Stone, *op. cit. supra* n. 40, at 7. See also Stone, "Some Aspects of the Problem of Law Simplification" (1923) 23 Col. L. Rev. 319, at 329-30.

54. Goodhart, *op. cit. supra* n. 1, at 173-4: "At the present time it is almost as difficult for the English lawyer to understand the American theory of precedent as it is for him to understand the civilian, and that in place of two conflicting systems—the common law and the civilian—we are now faced with three different methods, the English, the American, and the civilian. The American system at present lies closer to the English than it does to the civilian, but the tendency seems to be for it to shift towards the latter." *Cf.* Gardner, "A Comparison of the Doctrine of Judicial Precedent in American Law and in Scots Law" (1940) 26 A. B. A. J. 774.

55. See Goodhart, *op. cit. supra* n. 19, at 44-60; Kocourek and Koven, *op. cit. supra* n. 25, at 980-1.

56. Blackstone gave as the reason for the rule of precedents the desire "to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." *Op. cit. supra* n. 16, at 69.

57. Jackson, "Decisional Law and Stare Decisis" (1944) 30 A. B. A. J. 334. The doctrine of precedents supplies "that cement of certainty which was required by the otherwise fluid judge-made law." Goodhart, *op cit. supra* n. 19, at 63.

58. Jackson, *op. cit supra* n. 57, at 334.

59. *Mahnich* v. *Southern Steamship Company*, 321 U. S. 96 (1944) at 113 (Mr. Justice Roberts dissenting).

Stare decisis assures all persons of *equality and uniformity of treatment*. It guarantees a government of laws and not of men, and that all men will be treated equally under the law. It prevents judges from exercising partiality or prejudice, either through corruption or ignorance. It minimizes the possibility that an inexperienced judge will fall into errors of injustice.[60]

Stare decisis is an instrument of *convenience and expediency*. "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[61] By enabling judges to decide a large proportion of the cases before them by resort to prior decisions, the doctrine permits judges to devote more time to unique and undecided questions and to render informed and just opinions on such questions.

Stare decisis preserves the judicial *experience* of the past.[62] This does not mean blind adherence to precedent,[63] but acceptance of rules and principles, the justice and wisdom of which time has not impaired. The common law has been wrought at the anvil of past wisdom by the hammer blows of numberless adjudications. Centuries of experience in law should not be overthrown without sound reason any more than experience in the physical sciences.[64]

The application of the doctrine of precedents results in an imposing array of undoubted benefits and in no inherent detriment to a common law system,[65] but nevertheless criticisms have been leveled against its operation in America on the grounds that other conditions have arisen which make it unworkable.

The foremost criticism heard today and early voiced by Kent[66] is that the great mass of extant case law often makes it impossible or a task of considerable magnitude to discover precedents, and as often makes it possible to find precedents on both sides of a given question. Needless to state, the criticism made in Kent's time as to the bulk of cases has been magnified progressively through the years as reported decisions continue to multiply.[67] The growth of administrative law with its mass of quasi-judicial decisions has added to the problem.

Closely related to the question of the quantity of decisions is the matter of their quality. "Legal opinions seem subject to the same natural law that affects currency: inflation of the volume decreases the value of each unit."[68] In addition to this more or less automatic "debasement", the quality of individual opinions tends to decrease as litigation increases because judges are forced to spend less time in research and thought on each case. Another factor affecting the quality of precedents is, of course, the quality of the judiciary. Holdsworth has said: "A system of appointing judges which does not secure both the presence of the ablest lawyers on the bench, and security of tenure, will never be able to operate successfully our English system of case law."[69]

It is also claimed that stare decisis is particularly suited to a centralized judicial system as in England, but is unworkable in America where there is a multiplicity of independent jurisdictions.[70]

Finally, it is charged that "the rapidly changing social and economic conditions in the United States place the rigidity of the case system under an unusual and heavy strain" whereas stare decisis "satisfies the needs of a country such as England where conditions are more or less static."[71]

Insofar as these criticisms that the

60. "With the American judiciary,—so largely elective, its members taken from the active bar, and in many instances soon returning to its ranks, to be forthwith replaced by new recruits, who, too often, though practically competent, have no particular interest in law as a science—the necessity for the steadying influences of the doctrine we are about to consider is greater than in other countries possessed of a more permanent bench." Von Moschizsker, *op. cit. supra* n. 31, at 409-10.

61. Cardozo, *op. cit. supra* n. 1, at 149.

62. In *Smith* v. *Allwright*, 321 U. S. 649 (1944), Mr. Justice Roberts said at 666: "This tendency [of overruling decisions] indicates an intolerance for what those who have composed this Court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors."

63. Holmes said: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Op. cit. supra* n. 41, at 187. However, Holmes has indicated elsewhere that he did not mean that the experience of the past was to be overthrown: "The life of the law has not been logic: it has been experience," *The Common Law* (1881) 1; *New York Trust Company* v. *Eisner*, 256 U. S. 345 (1921), at 349: "A page of history is worth a volume of logic."

64. Other results of stare decisis, which may at one time have been considered to be beneficial, have been omitted because their benefit is doubtful today, such as the fact that stare decisis promotes a logical and scientific development of the law, or *elegantia juris*. See Goodhart, *op. cit. supra* n. 19, at 52-4; Cardozo, *op. cit. supra* n. 1, at 34.

65. Von Moschzisker, *op. cit. supra* n. 31, at 414: "All scientific systems produce their own guiding doctrine; in the common law, a controlling one is that the greatest average of good and the least harm will be achieved if a court, having once deliberately adopted and declared a rule of action or construction of a statute or constitution, shall not, in future cases, disturb its prior decision except for very cogent reasons, and on a clear conviction of error. This maximum good and minimum harm is the chief mission of *stare decisis*."

66. Kent, *op. cit. supra* n. 8, at 474-5.

67. In 1840, there were 50,000 decisions; in 1890, 500,000 decisions; in 1940, 1,750,000 decisions; in 1990, an estimated 3,750,000. Lavery, "The 'Findability' of the Law" (1943) 24 Chi. Bar Rec. 272, at 273. See also, Lavery, "Volume of Judicial Decisions" (1940) 26 A. B. A. J. 622.

68. Jackson, *op. cit. supra* n. 57, at 335.

69. Holdsworth, *op. cit. supra* n. 11, at 191. *Cf.* Goodhart, *op. cit. supra* n. 19, at 61: "The very strength of the judges would seem to be an argument against, rather than a reason for, the binding nature of precedent." While it may be true that weak judges are a reason for adhering to the doctrine of stare decisis, nevertheless strong judges, by establishing sound precedents, strengthen the operation of the doctrine and guarantee its continued existence.

70. Holdsworth, after stating that the doctrine of stare decisis has worked admirably in England, warns "that a system of case law will never be so successful as it has been in England, in the absence of the peculiar conditions in which it originated and developed." Holdsworth, *Some Lessons from Legal History* (1928) 20. These conditions are: (1) a centralized judicial system, (2) a group of learned lawyers, both at the bar and on the bench, who are bound together by a common professional tradition, and (3) an independent bench which is, on the whole, more able than the bar. Discussed by Goodhart, *op. cit. supra* n. 19, at 61. See also, Goodhart, *op. cit. supra* n. 1, at 190: "The American law student, having been taught not the law of a single jurisdiction but the principles of a number of different jurisdictions, is less inclined to believe in the authority of precedents than his English brother."

71. Goodhart, *op. cit. supra* n. 1, at 188-9.

doctrine of stare decisis is unworkable in the United States are unfounded, they can and should be answered, and insofar as they are sound, remedies to obviate the grounds on which they are based can and should be suggested.

III

Decreasing the Quantity of Decisions

Almost everyone would agree with Mr. Justice Cardozo that in America "adherence to precedent should be the rule and not the exception"[72] and with Mr. Justice Jackson that "to overrule an important precedent is serious business."[73] In the absence of a code,[74] the necessity of the doctrine of stare decisis as the keystone of stability cannot be controverted. The second principle is equally necessary. Every judge of human conduct, whether a justice of the Supreme Court of the United States or a local magistrate, should consider with Cardozo that "revision is a delicate task, not to be undertaken by gross or adventurous hands, lest certainty and order be unduly sacrificed"[75] and with Jackson that overruling "calls for sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other."[76]

Adherence to precedent decreases litigation. Ill-considered overruling encourages plaintiffs to "prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard" and forces defendants to defend rather than to settle litigation "for they will have no assurance that a declared rule will be followed."[77]

The number of current decisions can also be decreased by improving and expanding pre-trial procedure, by making appellate jurisdiction discretionary instead of mandatory, and by encouraging courts with discretionary jurisdiction to limit the number of causes which they review.[78] With the quantity of pending cases reduced, judges can devote more time to the finding of prior decisions, to the selection of the soundest precedent from conflicting ones, to the careful study required of the advantages and disadvantages of overruling precedents, and to the vast research involved in creating sound, new precedents for novel situations. All of these factors will tend to increase the quality of case law.

Increasing the Quality of Decisions

By making stare decisis the rule rather than the exception, and by limiting the number of cases reviewed, litigation will decrease to some extent, but not to the extent of removing the grounds for the criticism that the mass of case law has made stare decisis unworkable. The rule of precedents must be made workable despite the bulk of decided cases. This can be done principally in two ways: First, the criticism that the multiplication of cases makes the finding of precedents impossible can be met by increasing the "findability of the law,"[79] and second, the criticism that the mass of decisions makes it possible to find precedents on any side of any issue can be met by intelligent selection of the correct and just rule from among conflicting rules by qualified persons who have more time to spend on a single proposition than the ordinary, hard-pressed judge. Several media exist for accomplishing both objectives.

Probably the oldest device for distilling legal principles out of the mass of decided cases and for selecting the proper principle out of irreconcilable decisions has been the treatise and the text book. "We know how much can be done by one man, acting and speaking only for himself, to build up a common law. Kent and Story did it in their day. Williston and Wigmore are doing it in ours. One dare not estimate the number of sane and sound judgments, useful members of society, that would have been brought into the world defective and deformed without the guidance of these masters."[80]

A second device has been the university law reviews, which, before impaired by wartime disabilities, were performing an increasingly effective service for lawyers and judges in finding and selecting proper rules and principles.[81]

72. Cardozo, *op. cit. supra* n. 1, at 149. See also, at 34, 112.

73. Jackson, *op. cit. supra* n. 57, at 331.

74. "No doubt the ideal system, if it were attainable, would be a code at once so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule." Cardozo, *op. cit. supra* n. 1, at 143.

75. Cardozo, *op. cit. supra* n. 41, at 120.

76. Jackson, *op. cit. supra* n. 57, at 331. See also, *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944) at 573-80: "But the rule of stare decisis embodies a wise policy because it is often more important that a rule of law be settled than it be settled right. This is especially so where as here, Congress is not without regulatory power . . . And before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity." (Mr. Chief Justice Stone dissenting).

77. *Mahnich* v. *Southern Steamship Company*, 321 U. S. 96 (1944) at 113 (Mr. Justice Roberts dissenting).

78. Murrah, "Pre-Trial Procedure—Some Practical Considerations" (1940) 26 A. B. A. J. 592; Jackson, *op. cit. supra* n. 57, at 335.

79. Lavery, *op. cit. supra* n. 67.

80. Cardozo, *op. cit. supra* n. 41, at 10-11.

81. *Ibid.*, at 11-16; Stone, *op. cit. supra* n. 53, at 331.

82. American Law Institute, 4 Restatement of the Law of Torts, Introduction, page x: "The Institute recognizes that the ever-increasing volume of the decisions of the courts, establishing new rules or precedents, and the numerous instances in which the decisions are irreconcilable, taken in connection with the growing complication of economic and other conditions of modern life, are increasing the law's uncertainty and lack of clarity. It also recognizes that this will force the abandonment of our common-law system of expressing and developing law through judicial application of existing rules to new fact combinations and the adoption in its place of rigid legislative codes, unless a new factor promoting certainty and clarity can be found. The careful restatement of our common law by the legal profession as represented in the Institute is an attempt to supply this needed factor. The object of the Institute is accomplished insofar as the legal profession accepts the Restatement as prima facie a correct statement of the general law of the United States." See also, Cardozo, *op. cit. supra* n. 41, at 1: "The law of our day faces a twofold need. The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent . . . The American Law Institute, recently organized, is an attempt to meet it." And see, Cardozo, *Law and Literature* (1931) at 121-141; Stone, *op. cit. supra* n. 53, at 332-7.

A more recent but certainly one of the most important devices for making stare decisis workable by extracting and choosing principles is the Restatement of the Law of the American Law Institute, which has now been completed.[82]

In addition to these established devices for finding and selecting the law, Mr. Lavery has suggested a new instrument which he describes as "a comprehensive and universal *law-finding manual*" which should be "keyed to *all* our encyclopedias and digests, and other comprehensive law compilations, through the same scientific device or method" and "published in a single desk-manual or hand-book of convenient size."[83]

It is probable that law professors, practicing lawyers, law students, and publishing companies, activated by a variety of motives, will continue to devise new, and to improve upon old, methods of finding and choosing the principles of law. The important fact from the standpoint of making stare decisis workable is that the judges *accept* principles and rules painstakingly extracted from the mass of case law by informed experts. The first volumes of the Restatement of Law were published in 1932, and the latest statistics compiled on the subject show that the Restatements have been cited 10,721 times in the reported decisions of appellate courts.[84] The most cursory examination of the decisions of the United States Supreme Court during the last several terms as contrasted with decisions of only ten or fifteen years ago shows strikingly the importance of the American law reviews as an aid to judicial decision.[85] Voluntary acceptance by the judiciary of these extrinsic aids will obviate the basis for demands that the judiciary be fettered by a mandatory code of one kind or another.[86]

Extrinsic aids will operate to enhance the quality of individual decisions regardless of whether those decisions apply, extend, or overrule old precedents, or create new ones. A further assurance of the quality of decision will be attained concurrently with improvement in the quality of judges by means of statutes providing for qualification, selection, tenure, and compensation of judges.[87] Quality will also be increased as lawyers and judges continue to attempt to obtain a better understanding of the complicated economic and social facts often involved in today's litigation.[88] Finally, the respect for tribunals generated by certainty in the law will be a means of attracting the best qualified jurists to the bench.

Increasing the Uniformity of Decisions

The objection that the American legal system lacks the centralization necessary for successful operation of stare decisis can be answered.

The first step should be the compilation and adoption by all states of a standardized and uniform legal nomenclature and terminology for use by the courts and the legislature.[89] Secondly, legislative draftsmanship should be constantly improved and made uniform. The National Conference of Commissioners on Uniform State Laws has accomplished much by its drafting of, and encouraging the adoption by states of, uniform statutes on many subjects. The American Law Institute has now undertaken in cooperation with the National Conference the production of a modern Uniform Commercial Code.[90] There remains, however, a great need for a comprehensive digest of the statutory law of all the states.

Uniform state legislation tends to make uniform state common law, first, by the practice of state courts of looking to other states for decisions interpreting the uniform statute, and second, because of the close relation between statutory and common law, by the practice of state courts of accepting sister-state precedents to fill gaps in the statutory law. The ultimate effect of this process is to encourage state courts to rely upon the decisions of courts of other states as precedents in situations totally unrelated to statutory law.

The Federal Judicial Conferences should be the pattern for similar state conferences and federal-state conferences to provide a uniform method of approach to judicial problems.[91] The various means through which precedents are found and evaluated, such as the Restatements, treatises and law reviews, also tend to impose a uniformity upon the decisions of the courts of the several states. Finally, the increase in the quality of precedents will encourage greater respect for such precedents in all states and will thus tend toward uniformity.

The Meaning of "Stability" as the Object of the American Doctrine of Stare Decisis

It has been charged that application of the doctrine of stare decisis im-

83. Lavery, *op. cit. supra* n. 67, at 275. And see, Lavery, "A Formula for Finding the Law" (1939) 25 A.B.A.J. 911.

84. Goodrich, "Report of Progress of the American Law Institute" (1944) 30 A.B.A.J. 666.

85. *Cf.* Cardozo, *op. cit. supra* n. 41, at 14: "Judges have at last awakened, or at all events a number of them not wholly negligible, to the treasures buried in the law reviews."

86. "You must not think of the product [of the Law Institute] as a code, invested with the binding force of statute. The only force it will possess, at least in the beginning, will be its inherent power of persuasion." Cardozo, *op. cit. supra* n. 41, at 9. Mr. Justice Stone has suggested that the Restatement receive legislative recognition and sanction, but that the courts retain full liberty to accept or reject Restatement principles when they conflict with precedents. Stone, *op. cit. supra* n. 53, at 335.

87. Hyde, "Selection and Tenure of Judges" (1941) 27 A.B.A.J. 763; "New York Experience Shows Need for Better Methods of Choosing Judges" (1943) 29 A.B.A.J. 690.

88. "Some of the errors of courts have their origin in imperfect knowledge of the economic and social consequences of a decision, or of the economic and social needs to which a decision will respond. In the complexities of modern life there is a constantly increasing need for resort by the judges to some fact-finding agency which will substitute exact knowledge of factual conditions for conjecture and impression." Cardozo, *op. cit. supra* n. 41, at 116-7. See also, Waite, *op. cit. supra* n. 40, at 257-60.

89. Lavery, *op. cit. supra* n. 67, at 275: "The doctors have recently left the lawyers far behind in this matter of nomenclature and terminology. They have recently published an unusual volume (after several years' research and study) called the 'Standard Nomenclature of Disease.'"

90. Goodrich, *op. cit. supra* n. 84, at 666.

91. Shafroth, "New Machinery for Effective Administration of Federal Courts" (1939) 25 A. B. A. J. 738; Parker, "Improving the Administration of Justice" (1941) 27 A. B. A. J. 11; Stone, "Functions of the Circuit Conferences" (1942) 28 A. B. A. J. 519.

pedes progress and is totally unsuited to the dynamic social and economic conditions of the United States.

It is true that under the strict English doctrine, fitting as it does into the common law scheme of intrusting progress to the legislature, the judiciary maintains almost absolute stability through stare decisis, and, obviously, absolute stability and progress cannot ordinarily be achieved through one and the same means. However, even the English theory of precedents tends indirectly to supplement the attainment of progress through the legislature by indicating and emphasizing for the legislature those matters requiring attention and change. "If inconvenience arises in the future, the Legislature can easily see the exact point requiring remedy, and can therefore easily make a law to fit the new circumstances."[92]

The doctrine of stare decisis which was so universally criticized twenty-five years ago is not the present American doctrine.[93] The present doctrine does not have as its ends the achievement of absolute stability or judicial statics, but instead it seeks to provide a pattern for progress.[94] In aeronautics, stability means the maintenance of flight on an even keel, without pitching or rolling. The American theory of precedents seeks to achieve stability in that sense—that is, in the sense of regulated progress rather than either immobility or movement without direction. There is a widespread notion that all change—every overturning of precedent—represents a social gain, reflects a wholesome "liberal" attitude on the part of the court, and is a progressive, forward step. This generalization is completely without validity in the frequent instances where the overruled precedent better fits into the pattern of progress than the overruling decision does.[95]

Facilitating Patterned Progress

However, the ability of the American doctrine to adapt itself to changing conditions should be facilitated by removing, wherever possible, impediments to flexibility such as the hardship which often results from, and which deters courts from, the overruling of relied on but outmoded precedents.[96] Judge-made law should be better coordinated with legislative law to assure progress along parallel lines.[97] At the same time the boundaries of flexibility should be delimited for litigants, lawyers and lower courts, by the overruling of precedents only in instances where the change fits into the overall pattern of progress, so that the law is in the spirit of the times rather than in the spirit of the judge who happens to decide or whose vote happens to be decisive.

Conclusion

It is the duty of lawyers and judges to make the doctrine of stare decisis workable, and it is the function of the Supreme Court of the United States and every lower American court to furnish our legal system with stability in the sense of patterned progress by voluntary adherence to the flexible American doctrine of stare decisis, which requires a careful weighing in each doubtful case of the advantages of adherence to precedent and the necessity for judicially planned social and economic progress to supplement legislative progress.[98] Under such conditions and to such extent, the doctrine of stare decisis should be applied for it is "the policy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth" for the law of our day.[99]

92. Holdsworth, *op. cit. supra* n. 11, at 192. Americans are keenly aware of the frequency with which Congress or one of the state legislatures enacts a law to annul the effect of judicial action. A recent example is the legislative activity which followed the decision of the United States Supreme Court in *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U. S. 533 (1944), holding fire insurance companies amenable to the Sherman Anti-Trust Act. In that case, however, legislation was intended to restore the rule which the court apparently overruled.

93. Goodhart, *op. cit. supra* n. 1, at 181-4.

94. Mr. Justice Rutledge has observed that the American doctrine "is not a doctrine of mortmain." *McKenna* v. *Austin*, 134 F. (2d) 659 (Ct. App., D. C., 1943) at 666.

95. In *Helvering* v. *Hallock*, 309 U. S. 106 (1940), Mr. Justice Frankfurter said at 119: "Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

96. This might be accomplished by deciding the instant case on the authority of the relied on precedent but announcing in the same case that the precedent was overruled for the future. *Montana Horse Products Company* v. *Great Northern Railway Company*, 91 Mont. 194, 7 P. (2d) 919 (1932), affd. in *Great Northern Railway Company* v. *Sunburst Company*, 287 U. S. 358 (1932); Shartel, "Stare Decisis—a Practical View" (1933) 17 J. Am. Jud. Soc. 6; Grinnell, "Judicial Regulation of Stare Decisis" (1941) 24 J. Am. Jud. Soc. 150; Snyder, "Retrospective Operation of Overruling Decisions" (1940) 35 Ill. L. Rev. 121; Kocourek and Koven, *op. cit. supra* n. 25. Or, as Mr. Justice Roberts suggests, the members of the Court might, as in the flag salute cases, supra n. 7, "make public announcement of a change of views." *Mahnich* v. *Southern Steamship Company*, 321 U. S. 96 (1944) at 113.

97. Stone, *op. cit. supra* n. 40, at 15; Cardozo, *op. cit. supra* n. 41, at 120; Cardozo, "A Ministry of Justice" (1921) 35 Harv. L. Rev. 113.

98. Pritchett, *op. cit. supra* n. 3, at 60-1: "But in spite of their many dissents, it is clear that the present members of the Court are closer together in their fundamental political and economic thinking than was the case a few years ago. There is an obvious difference between the moderate Roberts, farthest right today, and the hard-shelled conservatives of the 1930's, McReynolds and Butler." Pritchett believes that the great number of dissents may be due to the fact that "the judges, having drawn closer together on fundamentals, are freer to argue over details, disputing more as lawyers and less as philosophers" and to the fact that "since the old rules have been overthrown in so many fields, there is a natural uncertainty while the new ones are being worked out." *Cf. Gance*, "The Passing of the Old Dissent" (1942) 21 Ore. L. Rev. 285, at 297: "[The present Supreme Court is] virtually without dissent on the old fundamental issues of government and economic life."

99. Cardozo, *op. cit. supra* n. 41, at 996.

Legal Education and Admissions to the Bar of War Veterans

by Joseph A. McClain, Jr.
OF THE MISSOURI BAR

The period from 1921-1941 witnessed a long and arduous struggle to establish minimum educational standards for admission to the bar in the various states. By 1941 over forty states had adopted by statute or court rule substantially the standards recommended by the American Bar Association in 1921 under the leadership of Elihu Root, who made at that time a compelling case for the necessity of such minimum standards as an essential means of giving the public protection against inadequately prepared lawyers. These standards call for two years of college training or its equivalent; graduation from an approved law school offering a 3-year course of full-time study or a 4-year course of part-time study; and passage of a state bar examination.[1] By 1941 the long and unremitting struggle to gain acceptance of these standards in the various states was approaching a successful conclusion, as all but five states had adopted the two-year pre-legal college requirement together with the other standards or their approximate equivalent.

This country's entrance into the war in December, 1941, presented a great threat to the standards in some states which made various relaxations with respect to the taking of bar examinations by law students entering the armed services. Law schools, also, made certain concessions as to credits for students whose training was interrupted by call to military duty. Basically, however, the educational standards have remained intact with, however, certain justifiable modifications, later to be discussed, in favor of returning veterans.

The law schools were brought close to the brink of disaster as a result of loss in student enrollment, and several schools were forced to close their doors for the duration. By 1944 most schools had suffered over an 80% reduction in enrollment. Despite these trying conditions, the approved law schools have adhered to these standards in substance and at the same time have accelerated the law course by operating the year round, thus enabling law students to complete as much of their work as possible before beginning military service.

Post-War Problems—Waiver of Standards

Thus, while the war gave a most severe jolt to legal education and threatened for a time to undo most of the hard-won gains towards insuring an adequately trained bar to serve the needs of the public, this period of difficulty has now largely been successfully weathered. Unfortunately, however, there now appears a challenge to the continued maintenance of minimum educational standards for admission to the bar which has far greater potentialities for grave and irreparable harm than the exigencies of war itself.

This is true because there are those who urge that out of gratitude and appreciation for the universally recognized splendid and courageous service rendered by the members of our armed forces, we should waive or substantially modify the tried and tested standards of admission to the bar for those veterans who may desire to enter the profession of law, and thereby permit them to practice law whether qualified or not.

Several states have waived the taking of a bar examination by re-

1. The following is a statement of the formal standards of the American Bar Association:

(1) The American Bar Association is of the opinion that every candidate for admission to the Bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition to admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years' duration if they devote substantially all of their working time to their studies, and a longer course equivalent in the number of working hours, if they devote only a part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

(e) It shall not be operated as a commercial enterprise and the compensation of any officer or member of its teaching staff shall not depend on the number of students or on the fees received.

(f) It shall be a school which in the judgment of the Council of Legal Education and Admissions to the Bar possesses reasonably adequate facilities and maintains a sound educational policy; provided, however, that any decision of the Council in these respects shall be subject to review by the House of Delegates on the petition of any school adversely affected.

(2) The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.

(3) The Council of Legal Education and Admissions to the Bar is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not and to make such publications available so far as possible to intending law students.

The responsibility for administering the standards and approving the law schools which comply with such standards has been placed on the Section of Legal Education of the American Bar Association. The Section elects a council of eleven (11) members which studies all problems affecting the standards and makes recommendations to the Section and the House of Delegates of the Association. The Council is assisted in its work by an adviser who devotes his entire time to this work.

turning veterans who have graduated from an approved law school. The States of New Jersey, Maine and Tennessee have recently by statute or court action changed their rules for admission to the bar examinations with the practical effect that the two-year pre-legal college requirement is waived as to veterans. The New Jersey rule provides that a person who has served six months in the armed forces during the war need show only a high school training in order to meet the preliminary educational requirements. The Maine rule provides that anyone with a high school training, who has served in the armed forces during any part of the war, shall be deemed to have a preliminary education equivalent to the two-year pre-legal college requirement. The Tennessee rule permits two years of such service, or completion of the course in an Officers Candidate School, to serve as a substitute for such preliminary education.

Without doubt other states have been urged and will increasingly be urged similarly to waive or materially relax their standards in favor of the returning veteran. It is encouraging to note, however, that the Court of Appeals of Kentucky on June 22, 1945, adopted for the first time the requirements for admission to the bar recommended by the American Bar Association. It is submitted that relaxation of the standards of admission to the practice of law, which have clearly demonstrated their worth, would result in incalculable harm and injury to the profession and to the public, and what is more would result in a great disservice to the veterans themselves.

In order to visualize the disservice that would be done by such relaxation, we need only to recall the tragic situation which obtained, particularly in the larger cities, during the late 1920's and early 1930's as a result of overcrowding the bar. Such overcrowding was due in large part to the admission of persons who were wholly unfitted for the practice of law. The consequence was that a great number of lawyers were in economic want, and the ethical standards of the profession suffered. Public esteem for the profession fell to an all-time low mark. Many lawyers who suffered in this period were veterans of World War I who had gained admission when the standards generally were low or non-existent, or by reason of relaxations in those states that purported to maintain some semblance of standards for admission to the bar. These veterans would probably be the first to characterize the present effort to permit veterans of this war to enter the profession without minimum qualifications as a sincere but entirely misguided effort and one bound to produce, if carried into effect, failures and bitter disappointments on the part of those thus admitted. The results that flowed from easy admission to the bar after 1918 were tragic enough, but a repetition of such a policy with respect to veterans of this war will increase many-fold the resultant injury to the veteran, to the profession and to the public.

Complexities of Law and Public Interest

So far the emphasis has been placed herein upon the disservice to the veterans themselves of a policy that would throw them into a profession for the tasks of which they would be unprepared, and in which profession their chances of earning a decent and honorable livelihood would be extremely slim. In addition, the profession of law and the public interest are also involved in high degree. Whatever one may think of the law and lawyers, the fact is that the law is more intricate and complicated, and consequently its problems more difficult to handle, than ever before in the history of our country. The political, economic and social changes that have occurred in the present century have placed great responsibilities on the legal profession, which must be composed of able and well-trained lawyers and judges if such responsibilities are to be discharged in the interest of the public. Never has the need been more imperative for the lawyer to be as broadly trained as is required today. The day of a relatively simple political and economic structure, that would permit the lawyer to solve most of his legal problems by fairly simple rules, is gone forever. The present condition has been well described by Silas H. Strawn, former President of the American Bar Association, and former Chairman of the Section on Legal Education and Admissions to the Bar, who stated in the October, 1944 issue of *The Bar Examiner*.

> We are living in a bewildering age. Every day, problems, political, social and economic, domestic and foreign, become more and more complex. To meet the present and anticipate the future, whatever our profession or occupation may be, we need more preparation and more understanding than ever before.
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> Never before in our history has there been a time when a lawyer needed a higher sense of his civic duty, a greater realization of his obligations as a citizen, a more thorough understanding and appreciation of the fundamental principles of our government and a keener perception of the difference between right and wrong. He must be more familiar with the general principles applicable to the business of his client than is the client himself. He must bring to the solution of the problems with which he daily is confronted a broad, general knowledge of what is going on in business, economics, politics and finance, not only in his own country but throughout the world.

It should be strongly emphasized, however, that to oppose relaxations in favor of veterans of the standards for admission to the bar, does by no means indicate a lack of sympathy and interest in the problem of the veteran, nor does it indicate that nothing has been done or should be done towards assisting him to enter the legal profession if he so desires. The American Bar Association through its Section on Legal Education and Admissions to the Bar and the approved law schools have been keenly aware of the need for doing all that is possible towards making special provisions in favor of the veteran who desires to begin or resume his training for the practice of law. Much has already been done towards assisting the serviceman in preparing

himself for the practice of law. The measures that have already been taken by the American Bar Association may be summarized as follows:

Pre-Legal Credit

Towards meeting the two years of resident college study and credit, a man or woman who has actively served six months in the armed forces may be given credit by an approved college for:

1. Military credit as such up to eight (8) semester hours of credit. This is substantially equivalent to what the student would earn by taking the basic military science course in the ROTC and the required physical education courses.

2. Formal courses taken in the service such as courses taken in the Army Specialized Training Program, the Navy V-12 program, and related programs of the other services. All such courses have been evaluated as to equivalent college credit by the American Council on Education and a Guide has been prepared and published which will readily show the recommended college credit values for each course so taken in the service. This Guide should make for nation-wide uniformity in the allowance of such credits by colleges. Information concerning this Guide may be had by writing the American Council on Education, Washington 6, D.C.

3. Correspondence courses taken while in the service either under the supervision of the services' educational programs or approved colleges.

4. General educational development as demonstrated by the score on the intellectual achievement tests which have been constructed by the United States Armed Forces Institute, or which may be given by educational institutions. Norms for these tests have been established, and these tests are discussed and explained in the Guide mentioned above. This method of securing credit will be particularly helpful to those men and women in the armed forces who did not enroll in formal courses but who may have had substantial intellectual growth as the result of independent study or reading.

The Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association recognizes pre-legal credit gained under the above-mentioned methods for the purposes of satisfying one year of the pre-legal college requirement, but does require at least one additional academic year of study in residence, either as a civilian or in the service, in an approved college or university and that the quality of such work be at least equal to the quality required for graduation by the college or university in which such work was done. This usually means a grade of C.

Law School Credit, Refresher Courses and Accelerated Programs

Law school credit may not be given for military training or for correspondence work. At the outbreak of the war, however, nearly all approved law schools, with the sanction of Council of the Section of Legal Education and Admissions to the Bar, made provision for granting residence and hour credit for the full work of the semester, quarter or session to any student who entered the service after having satisfactorily completed at least one-half of the class room work of such semester, quarter or session. This provision will be of value to those students whose law school study was interrupted under the conditions above described.

The American Bar Association, state and local bar associations, and the approved law schools, have designed plans for refresher courses for the benefit of those whose law study or practice was interrupted by entry into the service. Such refresher courses will, in the case of the law student, greatly assist him in getting back into the "swing of law study," and, in the case of the lawyer returning to the practice, will serve to bring him up to date on legal developments that occurred during his absence, and will also aid, it is believed, in giving him encouragement and confidence to resume his practice. Moreover, those lawyers who utilize such refresher courses, which will be made available at key points all over the country, will be in a better position to serve their clients creditably.

Of particular interest to the serviceman either resuming or beginning law study is the accelerated program in effect in most colleges and law schools which now operate the year round. Under such a program, it would be feasible to complete all of the two-year pre-legal college course and the three-year full-time law school course, normally requiring five years, in three and one-third years. These accelerated programs have been definitely established to meet war and post-war conditions, and will probably be continued for several years after the war in order to accommodate servicemen who are desirous of shortening the actual calendar time normally required to prepare for the practice of law.

Financial Aid

The argument of the prohibitive expense of additional education, which has often been used as a reason for opposing educational standards, seems to be removed for the veteran who would be a lawyer. Under Public Law 346, which is generally known as the GI Bill of Rights, any veteran who was inducted into the armed forces before he was 25 years of age presumably had his education interrupted by the war. He, therefore, is entitled, as a matter of right, to one full year of work in an educational institution plus a period of time equivalent to that spent in the armed forces. So if such a serviceman had been in the armed forces for two and one-third calendar years, he would be able to get his pre-legal college work plus his full law school program at the expense of the United States in a school which is operating on the accelerated program.

In addition to such government aid, most colleges and law schools have scholarship funds available to aid the deserving student. Such funds will, in all likelihood, be larger in the post-war period because of the accumulation of income in trust funds which were not fully used dur-

ing the war period because of lack of students. Moreover, some states have already adopted legislation providing for free tuition for persons who served in the armed forces, even though they do not qualify for long-term education under the Federal Act. Therefore, both scholarship funds in private colleges and universities and free tuition in many state universities will be available for assisting the veteran who is not entitled to full educational benefits from the Federal Government.

To summarize briefly, we see then that the American Bar Association, the state and local bar associations and the approved law schools have been deeply conscious of the fact that the members of the legal profession, along with all other members of the American public, owe a debt of gratitude to the men and women in the armed forces. As to those who expect to become lawyers, there is a responsibility to do everything possible to assist them in securing a legal education. The following methods of assistance have been devised:

1. Pre-law credit may be allowed for courses taken or for demonstrated intellectual growth while in the service, and the college resident requirement has been reduced to one year from two;

2. Special provision has been made for granting credit to those law students who had their law study interrupted by call to the service;

3. Refresher courses are to be provided for law students and lawyers to enable them more easily to pick up where they left off;

4. Colleges and law schools have accelerated their programs (requiring, incidentally, many teachers to work the year round for little, if any, additional compensation) so that the calendar time required of a student to prepare himself for law has been shortened by approximately one-third, and

5. The government has provided financial aid which can be augmented by scholarship assistance or state tuition grants to enable the veteran to prepare for his chosen profession without great financial hardship.

In view of all these facts, it is submitted that the worthiness of the cause of the veteran of this war who may desire to enter the legal profession has not gone unheeded by the legal profession or the law schools. Instead most careful thought has been given and sound plans have been laid to serve both the interests of the veteran, the profession and the public by measures that will enable the veteran, without undue hardship, to prepare himself so that both he and the public he is to serve will benefit from his service in the legal profession. It is likewise submitted that any other course which would permit the veteran to come to the bar without adequate preparation would result in a rank disservice to the veteran and in a grave injustice to the profession and to the public.

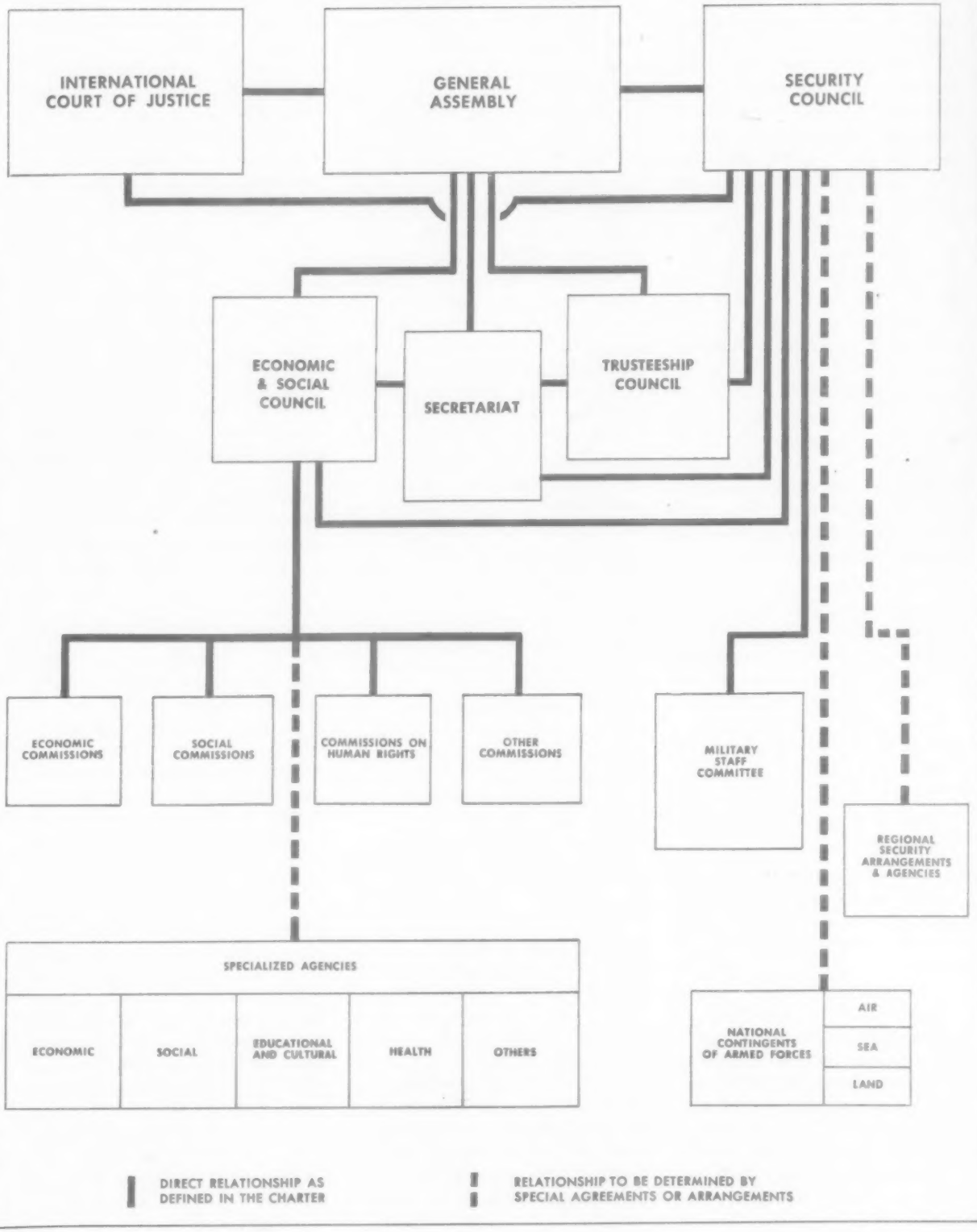
In many states we have standards which require study ranging from three to six years, for doctors, trained nurses, osteopaths, optometrists, pharmacists, dentists and public school teachers. It requires three years of apprenticeship to become a registered barber in some states, and union organizations generally require that a four-year period be served by plumbers before they are permitted to practice plumbing.

There seems to be no disposition on the part of any group to reduce the educational period for professions other than law, such as dentistry or medicine. Nor for that matter has there been action which would shorten the period of time required to be served by an apprentice before he becomes a skilled tradesman. If it is sound to say that a man has matured intellectually enough in the armed services to have satisfied the two-year pre-legal requirement, it would seem that he would have matured sufficiently to have completed a pre-dental or pre-medical requirement. It would seem clear that the reasoning which supports the maintenance of standards in the other professions is equally applicable to the law. Certainly law cannot be deemed less important to the public than the other professions. Adequate preparation for the practice of law is especially important at the present time because, as has been pointed out earlier in this discussion, the increased complexity of the law and the difficulties of the problems now facing lawyers require the best possible education and training if the interests of the public are to be served.

It may be conceded that a faulty operation by a physician, a poor shave by a barber or a pipe improperly installed by a plumber may give us greater concern for our personal safety or comfort than the doings of ill-prepared lawyers, but it is also submitted that the conduct of the lawyer—whether good or bad—has as great, or even a more lasting effect upon the welfare of society. If this war has taught us several lessons, as it should have, one of these certainly is that only by creating a sound national and international legal order founded upon principles of justice and equity can civilization hope to survive and go forward. A legal system can rise no higher than the standards and ideals of the members of the legal profession whose special duty it is to assist in improving the system and maintaining its standards.

These paramount considerations should be carefully weighed by all who may be inclined to urge that the standards for admission to the bar be waived or relaxed in favor of those who have so courageously served their country on the field of battle. These veterans will have had an invaluable experience in the development of courage, self-discipline and character, but that alone will not qualify them to be lawyers, and substantial slackening of the present bar standards which have been so generally adopted and so successfully applied would constitute one of the greatest disservices that could be done to the veterans in their future careers as lawyers.

ORGANIZATION OF THE UNITED NATIONS



FRANCIS BIDDLE

JOHN J. PARKER

Named to Try Axis War Criminals

President Truman announced on September 12 his selection of two members of the American Bar Association to serve as the American judge and alternate on the International Tribunal to try Axis war criminals. Francis Biddle, former Attorney General of the United States will serve as judge, and Judge John J. Parker of the Fourth Circuit Court of Appeals as alternate.

Francis Biddle was nominated by President Roosevelt to be the fifty eighth Attorney General of the United States.

After his graduation from Harvard Law School, he served as private secretary to Justice Oliver Wendell Holmes. He began the practice of law in Philadelphia in 1912 and continued in practice there until 1934 when he was appointed chairman of the National Labor Relations Board. In 1938 and 1939 he was appointed chief counsel of the Joint Congressional Committee created to investigate the Tennessee Valley Authority. In 1939 he was made United States Circuit Judge for the Third Judicial Circuit but was called from that post to become Solicitor General of the United States. He served in that position until his appointment as Attorney General. Mr. Biddle was a member of the House of Delegates of the American Bar Association from 1940 to 1945.

Judge Parker was born in Monroe, North Carolina. After his graduation from the University of North Carolina, he was admitted to the Bar in 1908 and began practice in Greensboro, North Carolina. He moved to Charlotte in 1922, served his state and country in many capacities—as special assistant to the Attorney General of the United States, member of the Republican National Committee, and delegate at large from North Carolina to the Republican National Convention. He was appointed judge of the United States Fourth Circuit Court of Appeals by President Coolidge in 1925.

Judge Parker has been a familiar and distinguished figure at meetings of the American Bar Association. He was presented the American Bar Association Medal in 1942 which is given each year to a member of the Bar of the United States who ha rendered conspicuous service to the cause of American jurisprudence.

AMERICAN BAR ASSOCIATION

Journal

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"They Are Homeward Bound—Take Care of Them"

By ships and planes from the four corners of the earth, many hundreds of thousands of American young men and women are on their way to their own land and their own homes, "to take up the challenge of that future which they did so much to salvage from the brink of disaster."

These days and nights mean joyous home-comings, for Americans in all localities and all walks of life. Among those who will come home are many of the 4,775 members of the American Bar Association who are thus far known to have served in the Armed Forces of their country. The sense of relief, the profound gratitude, and the glad welcomes, are for all who come back; but it is within the province of this Journal to speak an especial word of greeting and welcome to the returning members of the profession of law.

In this hour we do not forget those who cannot rejoin us now, nor those who will never come back home. Several millions of our young men and women will of necessity remain for months and years in foreign climes, to perform stern duties of protecting the hard-won peace and seeing to it that justice, order, reconstruction, rehabilitation, and opportunity for conquered peoples to choose their own governments and way of life, shall not be thwarted by any recurrence of the rule of dictators. We feel deeply for them in their nostalgia for home and their long, hard tasks in behalf of a better world—more difficult because the moving drama and inspirations of combat have ceased. We shall await eagerly the happy hour of their home-coming.

Others will never return to their loved ones and their homes—these we shall hold always in grateful remembrance, and shall try to preserve the things for which they gave their lives. We owe them that. As General MacArthur said so reverently to a hushed world on the night of the formal surrender of the Japanese: "I speak for the thousands of silent lips, forever stilled among the jungles and the beaches and in the deep waters of the Pacific which marked the way" — likewise, in the hills of Normandy, and along the Rhine and the Elbe, in the fastnesses of Italy and on the sands of Africa, and at countless unmarked places where took place the struggles of shipping and transport on the seven seas.

More than a few who gave their lives were of our own profession—the gallant Colonel Gardner Conroy of the New York Bar, a shining target on the beach at Makin —young men fresh from law school and hardly started in law offices, who found themselves plummeted from planes to earth in island jungles—many others whose names and exploits will become a part of the heritage of our Association and our profession. Suitable chronicles of the names and services of those lawyers who made the supreme sacrifice for their country will in due time be inscribed.

Of those who have returned and those who will return, we say, to their home communities and the law offices from which they came: "They are homeward bound—take care of them."

With General MacArthur we urge that they deserve more than an honored place among us. We cannot leave them wholly to their own resources, their instincts of pride and self-help. Adjustments will have to be made for these returned lawyers, to fit them back into office organizations and routines of work. Many of the offices from which they came have ceased to exist, during the war; new openings will have to be found for some of the returned lawyers; new locations may be preferred by many of them. They will need "refresher" opportunities to bring themselves abreast of the many changes in the law and to re-orient themselves to the daily work of the profession for clients. That may not be easy for youths who but yesterday were bombing the Kuriles or patrolling the Bavarian Alps.

For those who return wounded in body or distracted in nerves or spirits, haunted by memories of the things they have seen, a sympathetic understanding must supplement medical science and psychiatry, to restore them to their health and capacity for sustained and useful work. Clients should bear all of the returned lawyer-soldiers in mind and heed the debt we all owe them, for these young men's means of independent livelihood were given up, in most instances, when they responded to their country's call and went forth on the great mission which is now fulfilled.

"The unnamed brave millions" for whom General MacArthur asked understanding and kindly help, deserve well of their country. Those of our own profession are our especial charge. The Bar Associations have done much preparatory work and should be on the job; but the responsibility is individual and local, in each community and office. Our profession should leave itself with no "forgotten men," no instances of denied opportunity and embittered outlook.

At this juncture a gladdened America should take deeply to heart General MacArthur's plea for the living who fought for us:

"They are homeward bound—take care of them."

Completing the United Nations Organization

October of 1945 will be an historic month, a land-mark on the long road to adequate international organization, because it will witness the completion of ratification of the great Charter and the annexed Statute of the Court by at least the number of Nations required to bring those instruments into effect.

Twenty of the United Nations had ratified, as of mid-September. Formal action by several others, probably as many as ten, is indicated for September or the first week of October. A delaying factor in the completion of all formalities by at least the required twenty-three states in addition to each of the five Principal Powers (31 A.B.A.J. 393-399), may be the time required for the transmittal and deposit of the attested documents in the National Archives in Washington. Whereas, in San Francisco it had been fondly hoped that the necessary ratifications could take place before the end of the year, that time schedule is now advanced nearly three months.

Meanwhile, the committees of the Preparatory Commission have been in preliminary sessions for nearly a month, in the historic Church House in London. As anticipated, the exploring and mapping out of a formidable amount of organizational detail have been necessary (31 A.B.A.J. 404, 406); and the required consultations with the respective governments have taken time. A vast background of history, precedent and experience has been taken into account, to avoid pitfalls and repetitions of past mistakes.

With characteristic energy, the American representative is urging the greatest possible advancing of the preparatory steps. For him the U N O dates from Dumbarton Oaks and was consummated at the Golden Gate. Mr. Stettinius submits now the practicability of a meeting of the full Preparatory Commission in mid-October, an organizational or business convocation of the General Assembly in mid-November, and the continuous availability of sessions of the Security Council, the Economic and Social Council, and like agencies of the new Organization from that time on. Climactically, he sets as an objective the convening of the first great formal meeting of the General Assembly on April 25, the first anniversary of the opening of the San Francisco Conference.

The agenda for the business sesssion of the Assembly will necessarily include many important items which can be determined only by that august body. These include the election of a permanent Chairman of the Assembly, the admission of new members (such "peace-loving" neutrals as Sweden, Switzerland, and possibly Portugal) upon whatever terms and conditions are decided on as appropriate, the calling for nominations for the International Court of Justice, the determination of the extent and type of buildings needed to house the Assembly, and some steps as to the selection of a seat for the U N O.

Phillip J. Noel-Baker, the British Minister of State, is among those members of the Preparatory Commission who doubt whether progress can be made as rapidly as Mr. Stettinius has urged. Regrettably, the background for much which is taking place seems to be a recurrence of ancient doubts as to the intentions of the United States. American indifference and delaying tactics, at the same stage, as to the League of Nations, are not too favorably recalled. Time and continued cooperation may largely iron out these deep-seated feelings.

Ratification of the Charter brings also into effect the Statute of the Court (31 A.B.A.J. 400-406), but the Court does not come into being until its members have been nominated and elected. This will require many months, after the business meeting of the Assembly. Meanwhile, the old Court and its Statute remain in existence, until the adherence of the parties to it is in some manner withdrawn. The present Court is not likely to function extensively during the gap.

Perhaps naturally, a good deal of the uncertainty as to the intentions of the United States arises from the failure of the President and the Senate to accomplish an acceptance of the obligatory jurisdiction of the Court, at the time of American ratification of the Charter. The United States and the Soviet Union are still laggard, as to a declaration under Article 36 of the Statute. Unfortunately, the matter has not been placed high on the program for the action of the Senate or the Congress, which are now re-convened after recess.

Bold leadership by President Truman and prompt action by the Senate, in behalf of the Morse Resolution or some similar declaration, would tend to remove grounds for suspicion that this country is content to leave justiciable matters within the domain of diplomatic negotiation and discretion, in the hands of the Council of Ministers and later in the Security Council.

We urge that all members of the American Bar Association, as well as other citizens interested in international justice according to law, should do immediately all they can to support and bring about the earliest possible passage of the Morse Resolution, or some like declaration, by the Senate of the United States. The votes and attitude of *your* Senators may be decisive any day.

Lessons from Analogy

The student of the origins and history of law as a part of the history of civilization, will discover interesting and instructive analogies between the methods by which man became the conqueror of the animal kingdom, and, those by which the peace-loving nations have conquered those who planned to take the power and the riches of

the earth and reduce the rest of the world to slavery.

Man conquered the monsters of the pre-historic age by his ability to kill his enemy at a distance. He could grasp and throw a club, a stone, a javelin or spear, and thus wound, frighten away or kill his more powerful enemy before that enemy could bring the fight to close quarters.

Soon man began to fight against man, tribe against tribe, nation against nation, and thus *victory* came to the man or tribe or nation whose weapons could kill at the greater distance. The sling with which the boy David killed Goliath was superseded by mighty engines which hurled great rocks into beleaguered cities, the bow was supplemented by the more powerful cross bow, and finally, with the invention of gunpowder, all those once dreaded weapons were discarded, and in quick succession came the musket, the rifle, the machine gun and artillery of such range, power and accuracy that radar controlled guns of our navy sunk, silenced and utterly destroyed at the first salvo, a Japanese battleship seventeen miles away, a distance so great that it was below the horizon and could not be seen from the highest lookout on our attacking battleship.

In the meantime, the race for supremacy in killing at a distance, had taken to the skies. Germany was defeated when the allied nations gained control of the air. Japan was defeated when the control of the sea by our navy was supplemented by control of the air. The complete and unconditional surrender of Japan was hastened by the fact that in the race for long range destruction, the United States and Great Britain were the first to produce and devise means for the practical use of the atom-bomb.

Are there no analogies in the history of civilization from which could be drawn lessons helpful to the solution of the grave problems of today?

When man had won mastery over the beasts of prey, and had begun to learn that man's most dangerous enemy was man, courts of justice were instituted so that disputes between individuals should be decided by impartial tribunals in which Justice should supersede Force.

Essential to the success of that plan, laws were made forbidding resort to the sword for the settlement of controversies between men. Courts were given the power at the instance of any person whose rights were involved in justiciable controversies, to summon his antagonist, so that both sides might be assured the right to be heard.

It is the opinion of some that by the law of Nations, including the agreements entered into by the United Nations, wars of conquest or wars to decide disputes of Nations as to ownership of land or for any purpose except defense, are now forbidden. If this has been done, it should be made clear to all.

If this has been done in part only, it should be completely done, fortified and reinforced.

If it has not been done the analogy which has abolished the duel and other types of warfare between individuals should be applied insofar as it is desirable as quickly as such a task can be completed.

There has yet been no final agreement as to the "compulsory jurisdiction" of the International Court of Justice to be formed by the United Nations. In this very field we find interesting analogies. When this question *first* arose, the jurisdiction of our English courts was limited to the questions of law and fact set out in certain "Writs." New "Writs" were authorized very slowly. Soon it became necessary to create Courts of Equity, because of the deficiencies of Courts of Law.

When in our Constitutional Convention a similar question arose, the Constitution was so written as to provide that all the judicial power of the United States should be vested in its courts and that the judicial power should "extend to all cases in law and equity," arising under our Constitution and the federal laws.

At San Francisco the matter of "compulsory jurisdiction" was left open and sooner or later must be decided. Because of that statute a heavy measure of responsibility rests on the lawyers of the United States to see that the new World Court be given sufficient "Compulsory Jurisdiction" to make it an effective instrumentality for the prevention of wars of aggression and conquest.

NOTICE OF ANNUAL MEETING

The Sixty-Eighth Annual Meeting of the American Bar Association will be held at Cincinnati, Ohio, December 17 to 20, 1945. Travel restrictions and governmental limitations on conventions have been relaxed sufficiently to authorize the holding of an annual meeting as prescribed by the Constitution and By-Laws of the Association, including meetings of the House of Delegates and the Assembly. The heavy burden under which the transportation systems of the country are laboring suggests the propriety of a self-imposed limitation on attendance to those whose presence has some immediate relation to the activities of the Association. Information on the program of the meeting will be given in the next issue of the JOURNAL. Requests for hotel reservations at Cincinnati should be addressed to Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois.

DAVID A. SIMMONS, President.

Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman*

Civil Rights—Equal Protection of the Law—Insurance Laws—State Licenses

Lincoln National Life Insurance Co. v. Read, 89 L. ed. Adv. Ops. 1250; 65 Sup. Ct. Rep. 1220; U. S. Law Week 4497. (No. 833, argued April 24 and 25, decided June 11, 1945).

The sole question here presented is said to be whether Oklahoma has denied the equal protection of the law, in violation of the Fourteenth Amendment.

The Oklahoma Constitution prohibited any foreign insurance company from doing business in that state until it had complied with the laws of that state in regard to the deposit of collateral or security for the protection of its patrons within the state and shall have agreed to pay all taxes levied pursuant to the statutes, and that failure to pay taxes or license fees should work a forfeiture of its license.

There was also a constitutional provision requiring all foreign insurance companies to pay each year an entrance fee of $200 and two per cent of all insurance premiums collected in the state. There were other requirements imposed on foreign companies not exacted of domestic companies.

The company complied with those exactions and paid the license fees for a considerable period until in 1941 the premiums were increased from two per cent to four per cent. These increases, like the original amounts, were required only from foreign companies. The company paid the exactions under protest and brought suit to recover the challenged increase. The Supreme Court of Oklahoma allowed recovery of that part of the increased rates for the part of the current year before the date of the statutory enactment but denied recovery for the part of that increased rate accruing after the statutory increase.

The company took the case to the Supreme Court of the United States by direct appeal, and the judgment of the Oklahoma Supreme Court was affirmed.

Mr. Justice DOUGLAS delivered the opinion of the Court. He first distinguishes the instant case from the *Hanover Insurance Company* case. There a foreign company purchased an Illinois company and took over and carried on its business. There was at the time of that purchase no reservation of the right to increase license fees nor any agreement to pay increased rates. Here the company in its application for admission expressly agreed to pay any increases prescribed by the state.

Mr. Justice DOUGLAS points out that the Court has held both before and after the adoption of the Fourteenth Amendment that a state "may impose on a foreign corporation for the privilege of doing business within its borders, more onerous conditions than it imposes on domestic companies." *Paul* v. *Virginia* heads the list of those citations.

Mr. Justice ROBERTS dissents.

The case was argued by Mr. Russell V. Johnson for the Lincoln National Life Insurance Company and by Mr. Fred Hansen for Read.

Civil Rights — Equal Protection — Workmen's Compensation

Copperweld Steel Co. v. *Industrial Commission,* 89 L. ed. Adv. Ops. 928; 65 Sup. Ct. Rep. 1006; U. S. Law Week 4374. (No. 684, argued April 5 and 6, decided April 23, 1945).

Copperweld Steel Company, hereinafter called employer, brought this original action in the Supreme Court of Ohio, in which it challenged awards made to certain of its employees alleging that the injuries suffered by them were not incurred in the course of nor arose out of the employment; that the awards were therefore beyond the jurisdiction of the Industrial Commission which entered them and unless they were abrogated the employer would be deprived of his property without due process of law and would be denied the equal protection of the law. The Supreme Court of Ohio sustained a demurrer and entered judgment against the employer. The employer appealed to the Supreme Court of the United States. The Industrial Commission moved to dismiss the appeal. The Supreme Court granted that motion.

The facts may be summarized as follows: The men who were injured or killed left the employer's plant in an automobile by a public road which crossed a railroad track. While crossing this track the automobile was struck by a train. The Commission, notwithstanding appellant's representation that the resulting injury and deaths were not compensable under the Act, entered the awards.

On the first hearing the Supreme Court of Ohio overruled the employer's contention that the statute authorized the institution of proceedings in that court to set aside compensation awards. Later the court held that the law of Ohio invested it with original jurisdiction in equity. In an amended petition the employer insisted that its purpose was to raise questions of constitutionality and that it was without remedy unless the court should set aside the awards. In a second decision the court notices these allegations and held that the employer was not a party to the

*Assisted by James L. Homire. The opinions in cases involving labor law are reviewed by E. J. Dimock, member of the Board of Editors.

compensation proceeding and as the awards were payable not by the employer but by the state out of its compensation fund, in which the employer had no interest, it could not be said that payment of the awards deprived the employer of property.

The Supreme Court raised two questions which it stated as follows: "First, were questions under the Fourteenth Amendment presented and decided below? We think that the appellant disclosed, and the court below understood, that the provisions of the Fourteenth Amendment of the federal Constitution were invoked." The second question was stated as follows: " . . . was the constitutional validity of the state statute drawn in question? If not, we have no jurisdiction on appeal." It was held, however, that since violation of the federal Constitution by a decision of the state court was involved, the Supreme Court of the United States had jurisdiction to review the decision on certiorari, but for the reasons above referred to in the opinion as to the lack of financial interest of the employer in the insurance fund and the consequent absence of financial injury to him, the appeal was dismissed and certiorari denied.

The case was argued by Mr. Robert G. Day for Copperweld Steel Company and by Mr. E. G. Schuessler and Mr. Albertus B. Conn for Industrial Commission of Ohio.

National Labor Relations Act—Finality of Enforcement Decree

International Union of Mine, Mill and Smelter Workers v. *Eagle-Picher Mining and Smelting Co., et al.*, 89 L. ed Adv. Ops. 1163; 65 Sup. Ct. Rep. 1166; U. S. Law Week 4451. (No. 337, argued January 31, decided May 28, 1945).

The plaintiff unions instituted a proceeding against the employer corporation charging unfair labor practices. After full hearings the Board ordered the employer to cease and desist from certain of the challenged practices and to reinstate 209 employees with back pay.

The employers sought review from the Circuit Court of Appeals, Eighth Circuit, and the Board filed a transcript of the proceeding in the same court and sought enforcement of the order. The unions were permitted to intervene and be heard in support of the Board's order.

The court modified the order and decreed enforcement. The modification related to the method of computing back pay; that decree was entered June 27, 1941. The employer companies made a computation of the accounts due the employees in accordance with the decree and tendered the amount they ascertained to be due. The Board reached the conclusion that a different method of compensation should have been adopted in the original proceeding.

February 4, 1943, namely, two years after the final decree, and after attempted compliance by the employers, the Board petitioned the Circuit Court of Appeals to vacate that portion of the decree which dealt with back pay and to remand the cause to the Board. The labor unions were permitted to intervene and support the Board's position. The companies challenged the jurisdiction of the court to vacate the decree and the Board moved for judgment on its motion. The court held that there had been no showing that the order and decree were obtained by misrepresentation or of wrongful conduct of the employers or that any mistake of the Board had resulted in any decree that was unfair and held that there was no justification for revision or remand and the petition of the Board was dismissed. The unions sought review by certiorari. The Board was made respondent, appeared and supported the petition.

The Supreme Court affirmed the action of the Circuit Court of Appeals.

Mr. Justice ROBERTS delivered the opinion of the Court. He defines the issue as follows: "The question presented is whether the National Labor Relations Board after seeking and obtaining a court order of enforcement of its own order, in the absence of fraud or mistake induced by the respondent, and after expiration of the term, is entitled to have the provisions of the decree prescribing the nature of the remedy set aside and the case remanded to it, for the prescription of relief it deems more appropriate to enforce the policy of the National Labor Relations Act."

Mr. Justice ROBERTS also declares that the important question presented is whether after a decree "entered at the Board's behest" the Board retains a "continuing jurisdiction" and may recall the judgment for further action, and remarks that this is not a "bill of review based upon fraud or mistake." The judicial character of the proceeding is further emphasized and it is said that the matter in review is not an administrative proceeding but that the administrative phase of the original proceeding has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act.

Mr. Justice ROBERTS also states that the petitioner's contention is that the nature and extent of the back pay remedy are matters lying within the "administrative discretion of the Board" and that a court's function is limited in imparting legal sanction to the back pay remedy once it has been determined that the Board has acted within the scope of its authority.

The opinion recognizes that the Board is entitled to "great latitude in devising remedies which it deems necessary to effectuate the purposes of the Act," and it is said, "The Board had exercised its discretion and devised a remedy. . . . What the Board complains of is that it is not permitted to exercise its admittedly wide discretion a second time, or any number of times it may choose."

As to the Board and the Court it is said "There is no question that the Act intended to vest exclusive jurisdiction in the courts once the Board in the exercise of its discretion had reached its determination and applied for enforcement. This prevents conflict of authority."

As an example of the unfairness of permitting the reopening of the decree, Mr. Justice ROBERTS says:

"The employers challenged the Board's order in the original enforcement proceeding, not only as it affected the charged unfair labor practices, but as touching the appropriate relief. When the Circuit Court of Appeals modified and affirmed the order the companies had an opportunity to apply to this Court for review, or to comply with the decree as modified by the court. They elected to follow the latter course only to be confronted, years later, with an attempt to rewrite a portion of that decree at a time when their right of review of other portions of it had expired."

In the final paragraph of the opinion Mr. Justice ROBERTS says: "We are dealing here with a decree of a court entered in a judicial proceeding . . . The only recourse open to the Board is the same that would be open to any other litigant, namely, a bill of review."

Mr. Justice MURPHY delivered a dissenting opinion in which Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice RUTLEDGE joined.

It is deemed necessary because of "important questions concerning the relationship of courts and administrative agencies" to reexamine and restate the facts. No misstatement of the record facts is found. The challenge is to the adequacy of the statement. They are restated more in detail, and inference from the restatement discloses that the differences, for the most part, lie in the conclusions to be drawn from the facts, and in emphasis and point of view.

The conclusion reached by Mr. Justice MURPHY on the merits is summarized as follows at the end of his first chapter: "Our concern here is not with the truth of the facts alleged by the Board or with the appropriateness of any other remedy the Board might devise. It is enough that the Board has cast sufficient doubt on the appropriateness and correctness of its original remedy to warrant resubmission of the matter to the Board for further consideration."

The second chapter of the dissent deals with the strictly legal aspects of the right to the recall of the decision asserted by the Board and denied by the prevailing opinion. As to this Mr. Justice MURPHY says: "A court has the unquestioned and continuing power to make corrections and changes in its unexecuted decrees even after the term of court in which they were originally entered has expired" and later "We are not dealing here with an ordinary common law money judgment which one party seeks to set aside for fraud, mistake, or newly discovered evidence. Nor are we met with an ordinary litigant seeking relief for itself from a judicial decree. We are concerned, rather, with the attempt of an administrative agency to effectuate the policies set forth in a Congressional mandate. Until those policies are effectuated through the enforcement and execution of statutory remedies, the agency and the courts should coordinate their efforts to realize the plain will of the people."

The case was argued by Mr. Louis N. Wolfe for International Union of Mine, Mill and Smelter Workers, Locals No. 15, et al., by Mr. Alvin J. Rockwell for National Labor Relations Board, and by Mr. John G. Madden for Eagle-Picher Mining & Smelting Co. et al.

State Labor Relations Act—Availability of Suit for Declaratory Judgment to Test Constitutionality

Alabama State Federation of Labor et al. v. *McAdory*, 89 L. ed. Adv. Ops. 1270; 65 Sup. Ct. Rep. 1384; U. S. Law Week 4541-4545 (No. 588, argued April 3 and 4, decided June 11, 1945)

The case was brought by four labor unions and an individual member of one of them in the state courts of Alabama for a declaratory judgment adjudicating the constitutional validity of certain sections of the Bradford Act, No. 298, Alabama Laws of 1943 (Code 1943, Tit. 26, §§ 376 *et seq.*). The Supreme Court of Alabama held constitutional the three sections attacked, sections 7, 15 and 16. The United States Supreme Court granted certiorari upon a petition presenting the contentions that the sections conflicted with the United States Constitution and with the National Labor Relations Act. After argument and upon consideration, however, the Supreme Court determined that the issues presented by the record were inappropriate for a decision in a declaratory judgment proceeding and dismissed the writ.

The CHIEF JUSTICE delivered the unanimous opinion of the Court.

The attacked section 7 requires that labor organizations "functioning" or "desiring to function" in Alabama shall file copies of their constitutions and by-laws and of the constitutions and by-laws of any national or international union to which they belong with the Department of Labor. Labor organizations "functioning" in the state are also required to file annual financial reports. The section makes it "unlawful" for any agent of any labor organization to collect moneys from any member while the labor organization is in default with respect to filing the annual report.

Section 15 makes it "unlawful" to collect any fee as a work permit.

Section 16 makes it "unlawful for any executive, administrator, professional or supervisory employee" to be a member in any labor organization permitting membership to employees other than those in such capacity, but provides: "The provisions of this Section shall not be construed so as to interfere with or void any insurance contract now in existence and in force."

Section 18 prescribes a civil penalty of $1,000 for each violation of any provision of the chapter by a labor organization and adds: "The doing of any act forbidden or declared unlawful by the provisions of this chapter . . . shall constitute a misdemeanor, and shall be punishable by a fine . . . or by imprisonment."

The CHIEF JUSTICE takes up the contentions of the petitioners under various heads, the first being "Infringement of freedom of speech and assembly by sections 7 and 16." He states their contention thus: "Specifically they argue that if they fail

to file any of the statements required by § 7 and afterwards function as a labor union within the state, by exercising their right of free speech and assembly, they may be subjected to the criminal penalties imposed by § 18, and may also be enjoined from so functioning by a civil suit in equity in the state courts." He points out that the specified penalty for the failure to file and the further penalty for collecting money without filing are not attacked as restraining freedom of speech or assembly and states that the Supreme Court is left uninformed whether the statute is to be construed as meaning that "functioning" by a labor organization "which has not complied with § 7 by filing the prescribed reports is itself a violation of the Act subjecting it to cumulative penalties under § 18." On this point the CHIEF JUSTICE concludes with respect to section 7: "Lacking any authoritative construction of the statute by the state courts, without which no constitutional question arises, and lacking the authority to give such a controlling construction ourselves, and with a record which presents no concrete set of facts to which the statute is to be applied, the case is plainly not one to be disposed of by the declaratory judgment procedure." He reaches a similar conclusion with respect to section 16 for similar reasons.

The CHIEF JUSTICE characterizes the next objection as "Conflict of sections 7 and 16 with the National Labor Relations Act." He disposes of the point as follows: "Since petitioners or some of them are not shown to function exclusively as bargaining representatives for employees in industries subject to the National Labor Relations Act, we cannot say that §§ 7 and 16 could in no circumstances be validly applied to them. The extent to which in fact the sections are or may be so applied, and in what circumstances, does not appear. In this state of the record we are not called upon to say whether or to what extent they may be constitutionally applied." The CHIEF JUSTICE notes in addition the absence of proof that the filing of information returns will impose such burdens on petitioners as to interfere with the performance of their functions under the National Labor Relations Act and the further absence of proof "to what extent § 16 can be taken to be applicable to any of them because of existing insurance arrangements with union members," in the light of that section's express disclaimer of application to insurance contracts.

The CHIEF JUSTICE then takes up the objection which he denominates "The validity of § 15 under the due process clause." He states that: "Petitioners assert that the section applying as it does to every form of collection of money, other than initiation fees or dues, 'as a work permit or as a condition for the privilege of work,' prevents numerous legitimate and desirable labor union practices and hence is so harsh, arbitrary and unreasonable in its application as to infringe due process," and thus answers the contention: "As the record presents no concrete case to which petitioners' contentions as to § 15 apply, we are unable to say whether its application in any given case not now before us would or would not be constitutional. [Citing cases.] Determination of these questions as well as the proper construction of the section which is challenged as vague and indefinite must await its application to some specific state of facts."

Under the head, "Other contentions," the CHIEF JUSTICE states that the contention that the requirement of section 7 to file reports denies due process of law may not be pronounced upon in a declaratory judgment proceeding where the record does not disclose the extent of the burden, that the objection that sections 7 and 16 are too vague and uncertain to meet constitutional requirements cannot be considered in a declaratory judgment proceeding in advance of their authoritative construction by a state court and that the court would not have granted certiorari to review so unsubstantial a question as the contention that the Act denies equal protection because its provisions have not been extended to business corporations or associations or to labor organizations which are subject to the Railway Labor Act.

The case was argued by Mr. Horace C. Wilkinson and Mr. Joseph A. Padway for Alabama Federation of Labor and by Mr. John W. Lapsley, Mr. John E. Adams, and Mr. James A. Simpson for McAdory.

Public Utilities—Federal Power Commission—Regulation of Accounting Practices—Jurisdictional Test

Connecticut Light and Power Co. v. *Federal Power Commission* 89 L. ed. Adv. Op. 691; 65 Sup. Ct. Rep. 749; U. S. Law Week 4265. (No. 189, decided March 26, 1945).

The Federal Power Commission asserted jurisdiction to regulate the accounting practices of the Company under the Federal Power Act as amended in 1935. The Act provides for the regulation of transmission and sale of electric energy in interstate commerce, and states that regulation of "that part of such business which consists of the transmission of electric energy in interstate commerce is necessary in the public interest, such federal regulation, however, to extend only to matters which are not subject to regulation by the States." The Company, a Connecticut corporation, serves customers only in that state and owns no public utilities properties outside. It is regulated by the State Commission as to its accounting and many other matters. It challenged the jurisdiction of the Federal Power Commission.

The Company changed its operating arrangements to avoid federal regulation. Only isolated operations were cited as a basis for the asserted jurisdiction. The characteristics of these operations are described in the opinion of the Supreme Court, which reversed a judgment of the Court of Appeals for the District of Columbia sustaining the Power Commission. Mr. Justice JACKSON delivered the opinion of the Court.

He observes that the predominant characteristic of the Company's business is that of local and intrastate service, that it owns no lines crossing the state boundary and connects with

no other company at the boundary. It has no business but Connecticut business for which it needs any facilities. Its purchases and sales, receipts and deliveries of power are all within the State, and its rates, fiscal affairs and accounting are regulated by Connecticut.

As explained by Mr. Justice JACKSON, the Act applies only to "public utilities" which means "any person who owns or operates facilities subject to the jurisdiction of the Commission" § 201(e). These are defined. "'The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.' § 201(b). Transmission and sale as used in this provision are further defined to mean respectively 'transmission of electric energy in interstate commerce' and 'sale of electric energy at wholesale in interstate commerce.' And the Act goes on to say: 'electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof' and that sale of electric energy at wholesale means 'a sale of electric energy to any person for resale.' §§ 201(c), (d). Of course as preamble to all of these provisions stands the policy declaration that Federal regulation 'of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.' § 201(a)."

After discussing the interpretation of these provisions by the Court of Appeals and the legislative history of the Act, Mr. Justice JACKSON states that the jurisdictional test is whether the facilities used are local distribution facilities. Elaborating this and explaining its implications, he adds: "We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test.

"Nor do we think the exemption of 'facilities used for local distribution' exempts only those which do not carry any trace of out-of-state energy. Congress has said without qualification that the Commission shall not, unless specifically authorized elsewhere in the Act, have jurisdiction 'over facilities used in local distribution.' To construe this as meaning that, even if local, facilities come under jurisdiction of the Federal Commission because power from out of state, however trifling, comes into the system, would nullify the exemption and as a practical matter would transfer to federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control. It does not seem important whether out-of-state energy gets into local distribution facilities. They may carry no energy except extra-state-energy and still be exempt under the Act. The test is whether they are local distribution facilities. There is no specific provision for federal jurisdiction over accounting except as to 'public utilities.' The order must stand or fall on whether this company owned facilities that were used in transmission of interstate power and which were not facilities used in local distribution."

Accordingly the cause was remanded for further proceedings by the Commission to make adequate findings as to whether the company's facilities are used in local distribution.

Mr. Justice RUTLEDGE concurred in the result.

Mr. Justice MURPHY delivered a dissenting opinion in which Mr. Justice BLACK and Mr. Justice REED joined.

The case was argued by Mr. Claude R. Branch and Mr. Gay H. Brown for Connecticut Light and Power Co., and by Mr. Francis M. Shea for Federal Power Commission.

Administrative Law—Judicial Review —Person or Party Aggrieved Entitled to Review

American Power & Light Co. v. *SEC*, *SEC* v. *Okin*, 89 L. ed. Adv. Ops. 1179 and 1254; 65 Sup. Ct. Rep. 1254; U. S. Law Week 4469. (Nos. 470 and 815, decided June 4, 1945).

The Public Utility Holding Company Act, § 24 (a) provides that "any person or party aggrieved by an order of the Commission" under the Act may obtain review of the order by the Circuit Court of Appeals of the Circuit of his residence or principal place of business.

In No. 470 American Power & Light owns all the common stock of Florida Power & Light Co., and an order of the Commission in proceedings pending before it required the latter to make accounting entries which will result in taking out of surplus moneys which would otherwise be available to pay dividends on the stock held by American. Both American and Florida were parties to the proceedings. American and Florida both petitioned, in separate circuits, for an order to set aside the challenged provision. The Commission moved to dismiss. A ground urged for dismissal was that American, as sole stockholder, had no standing to seek review of the order. The Circuit Court of Appeals granted the motion. On certiorari this ruling was reversed by the Supreme Court. Mr. Justice ROBERTS delivered the opinion of the Court.

The opinion states that a stockholder "having a substantial interest distinct from that of the corporation which is directly and adversely affected by an order of the Commission irrespective of any effect the order may have on the corporation, is a 'person aggrieved' within the meaning of Section 24(a)."

The Commission argued that the stockholder's action is derivative, that it must be presumed that Florida would endeavor to protect the interest of its sole stockholder, and that no necessity was shown for ac-

tion by American. This contention is rejected on the ground that the economic interests of the two corporations are different. In exposition of this the opinion states: "The difficulty with this contention is that the action of the Commission in ordering the transfer of an item from surplus account to another account where the item will not be available for the payment of dividends does not deprive the corporation of any asset or adversely affect the conduct of its business in the manner it affects the petitioner, whereas the order has a direct adverse effect upon American as a stockholder entitled to dividends."

Portions of the legislative history of the Act are cited also in support of the conclusion reached.

In No. 815 it appeared that Electric Bond & Share Co. loaned $35,000,000 to a subsidiary, American and Foreign Power Co., and questions as to the loan's refinancing were the subject of a proceeding before the Commission. Okin, as owner of 9,000 shares out of 5,250,000 common shares of Electric Bond and Share was allowed to participate in the proceedings. He opposed a proposition the two companies submitted for refinancing the loan. The Commission approved the proposal, and Okin petitioned for review of the order. The Commission moved to dismiss, a ground therefor being that Okin had no standing to petition for review. The motion was denied, and on certiorari this judgment was also affirmed, and is dealt with in the same opinion as that dealing with No. 470. Here the opinion emphasizes that Okin's interest was opposed to that of the corporation in a transaction which he attacked for illegality and fraud. "His corporation urged that the Commission approve the transaction thus taking a position adverse to him. His application for review of the Commission's order approving the settlement was, therefore, in the nature of a derivative or stockholder's action. Inasmuch as he charged illegality and fraud, it is evident that application to the Board of Directors would have been futile. Under the Commission's own view, therefore, the Circuit Court of Appeals was right in denying a dismissal of the proceeding for lack of standing on the part of Okin to initiate it."

Mr. Justice DOUGLAS did not participate.

Mr. Justice BLACK and Mr. Justice REED concurred in the result in No. 815.

Mr. Justice MURPHY delivered a dissenting opinion in which Mr. Justice BLACK and Mr. Justice REED concurred, to the extent that it deals with No. 81.

The cases were argued by Mr. R. A. Henderson for American Power and Light Co., by Mr. Roger S. Foster for SEC and by Mr. Samuel Okin *pro se* in No. 815.

Administrative Law—Review of Orders of Interstate Commerce Commission—Appeals to Supreme Court

United States et al. v. *Hancock Truck Lines, Inc.*, and *Regular Common Carriers Conference* v. *Hancock Truck Lines, Inc.* 89 L. ed. Adv. Ops. 924; 65 Sup. Ct. Rep. 1003; U. S. Law Week 4372. (Nos. 448 and 449; decided April 23, 1945).

Hancock Truck Lines, Inc. is a motor carrier. It acquired the operating rights of Globe Cartage Co., a motor carrier, which had a pending application before the Interstate Commerce Commission for a certificate of convenience and necessity under §§ 206 (a) and 209 (a) of the Interstate Commerce Act. Truck Lines prosecuted the application as Globe's successor for exercising the latter's so-called "grandfather" rights, i.e., to continue Globe's operations as conducted July 1, 1935. The Commission awarded a certificate for certain routes, but restricted operations to traffic moving on bills-of-lading of freight forwarders. Petition for rehearing was filed to enlarge the routes, but objection to the restriction to traffic from freight forwarders was waived.

In a suit to set aside this restrictive part of the order, a three judge court ruled for Truck Lines. A single judge allowed an appeal within less than sixty but more than thirty days after entry of the decree. On appeal to the Supreme Court the decree was reversed. Mr. Justice ROBERTS delivered the opinion.

The Court holds, that although it has jurisdiction to hear the appeal, it is powerless to pass on the substantive question. Three points are decided: (1) Under the Act of October 22, 1913, the appeal was timely taken, because within sixty days from entry of the decree; (2) the appeal was properly allowed, even though allowed by a single judge; and (3) the Commission's order cannot be reversed in respect of a provision thereof as to which the appellant had waived objection.

The cases were argued by Mr. Edward Dumbauld for United States in No. 448, by Mr. B. W. La Tourette for Regular Common Carriers Conference, by Mr. Albert Ward and Mr. Ferdinand Boon for Hancock Truck Lines.

"Books for Lawyers"

THE AMERICAN LANGUAGE. AN INQUIRY INTO THE DEVELOPMENT OF ENGLISH IN THE UNITED STATES. SUPPLEMENT I. *By H. L. Mencken. New York: Alfred A. Knopf. 1945. $5.00. Pages xv, 739.*

Bernard Shaw once said that the greatest obstacle to a lasting concord between the English and American peoples is their common belief that they speak the same language. Although that belief long persisted, there were, even in the early days, dissentients. John Witherspoon, one of the signers of the Declaration of Independence, coined in 1781 the word Americanism. The expression "American language" was used in debates in Congress in 1802 and probably before that time. In 1923 bills were introduced in the Congress and in the legislatures of several states, to make the American language official, without clearly defining it. Only in Illinois was such an Act passed.

What legislation failed to accomplish has now come about in other ways. In 1944 the Chicago University Press completed the publication of *A Dictionary of American English*, and in 1939 there was launched the monumental *Linguistic Atlas of the United States and Canada.*

World War II sharply accentuated the differences in the languages of the two countries, and both American and English military authorities found it necessary to have compiled American-English and English-American glossaries for their troops.

For the cause, none has labored more assiduously or effectively than Mr. Mencken. His *American Language*, published first in 1919 and almost completely rewritten for the fourth edition in 1936, is a learned and entertaining book. The present volume is the first of two supplements to that edition. Although it does not purport so to do, it supplements also the *Dictionary of American English*, which does not undertake to investigate American slang after 1875 or the American vocabulary in general after 1900.

At times Mr. Mencken's iconoclasm has obscured his scholarship. Mr. Justice A. Rives Hall, of the Canadian Court of Appeals, wrote that in preparing the *American Language*, "Mencken has ransacked the Bowery and the haunts of Chicago gunmen, isolated valleys in the mountains of the South, mining camps and Western saloons, dives on the Mexican border, the training camps of pugilists, and the slums in which are congregated unassimilated foreigners."

When his work was sanctioned by the publication of the first fascicle of the *Dictionary of American English*, its value was duly recognized. The *London Spectator* editorialized: "This first part disposes once for all of transatlantic bickering, fear of contamination, and the hot suspicion that the American language was something wickedly thought up as a hoax by Mr. Mencken in his Baltimore den."

It is not surprising that others than those whom he calls "high octane purists" and "prudent word-fearing men" should have been suspicious of Mr. Mencken's efforts. He had done incidentally what Mr. Justice Hall said. Although he did not offer these gleanings as examples of good usage, he did not always make this clear. Everything he wrote was amusingly readable. For some pedants this was the bar sinister. That perhaps will be their reaction to the present volume, for it is a lusty rollicking, scholarly book — language with laughter.

Mr. Mencken has discovered the springs that have supplied the turbulent stream which is now American English. From the beginning, the English-speaking Colonists required new words to name new objects and describe novel conditions. The Indian languages and the languages of other immigrants were drawn upon; old English words were given altered meanings or arranged in new combinations; neologisms were coined.

The great Western movement accelerated the pace, and it continued unabated. For a time most of the neologisms were Westernisms. But as immigration became diversified, the language of each group furnished its quota, although the contribution of Spanish remains unequalled. Tapping as it does all these pools, the greatest single source is probably American slang.

Mr. Mencken holds that today the professional word-makers produce a majority of the new words — "subsaline literati, e.g. gossip column journalists, writers of radio and movie scripts, songwriters, comic strip artists, theatrical, movie and radio press agents" and "the persons who invent new names for new products —and the advertising agents who distort and torture the language in whooping them up."

If one may judge by the inclusiveness of his discussion, Mr. Mencken, as the "blurb" boasts, must have consulted everything printed about the American language, not only in the English-speaking countries, but also in Europe and Japan, and in addition corresponded with thousands of individuals. Nothing is so difficult as to defy analysis; nothing so trivial as to escape attention.

One excellent test of his accuracy in the discussion of trade names and the precise distinction which he draws between those — kodak, coca-cola, vaseline — which are permanently protected as trade names and those— aspirin, cellophane, linoleum—which are not. Another is his historical account of the use of foreign languages in the courts of certain states—French in Louisiana, and Spanish in Texas,

California and New Mexico.

The law itself has furnished many Americanisms. Mr. Mencken reminds us that the use of one of these—"appellate" in the expression "appellate court"—was at first stoutly resisted. Most were found useful and accepted without demur.

Many were required to describe our unique institutions. Alexander Hamilton first used "constitutionality", in 1787. Of later vintage are "constitutional amendment", "constitutional lawyer", "constitutional convention", "presidential", and "governmental". Other Americanisms, the need for which is obvious, are "selectman", "State house", "State's Attorney", "district attorney", "land office", "locate", "homestead", "betterments", "holding company".

Modern business having developed both in England and America after the separation and under different conditions, it was not unnatural that its word coinage should be dissimilar in the two countries. This is less noticeable in the partnership field—although our "silent partner" is to them a "sleeping partner"—than in that of the private corporation. The Britisher to whom you mention "corporation" is inclined to think of a municipality rather than of one of his own "limited liability" companies. Solicitors and barristers who seek to adjust the respective rights of the holders of ordinary and preference shares are concerned with company law in the same way that American lawyers are practicing corporation law when they deal with the claims of the owners of common and preferred stock.

The chairman of a British bank feels the same satisfaction when he tells his governors and shareholders of a substantial reserve that the president of an American bank expresses when his report to his directors and stockholders discloses the desired surplus.[1]

The argot of our profession, although it sometimes differs in the two countries, is always understandable. The recent law school graduate, who has just been admitted to the Bar, finds his first case, involving an installment-plan contract, on the calendar; he grabs his brief case and hurries from his office to the court room, makes sure that the court stenographer is present and, when his turn comes, asks his client to take the witness stand. The young barrister, who after eating the necessary dinners at his Inn, has been called to the Bar, has been briefed by a solicitor who has a case involving the hire-purchase system. When it appears on the day's cause-list, he leaves his chambers, carrying his portfolio, in ample time to don his gown in the robing room, enters the court room, glances at the shorthand writer, and, when his case is noticed, places his first witness in the witness box.[2]

For the production of Americanisms no field is more lush than that of politics.[3] "Caucus" and "filibuster" are typical examples of useful terms.[4] After considering all the evidence Mr. Mencken decides that "O. K.", which he declares "is without question the most successful Americanism old or new"[5] was plucked from the field of politics. It was the name of a club that supported Martin Van Buren, and was an abbreviation of Old Kinderhook, the name of the village in which Van Buren was born.

Never was the crop more abundant than during the years of the New Deal. "Horse and buggy days", "directive", "yard-stick", "prime the pump", "under privileged", "coordinator", "expediter", "prince of pelf", "economic royalist", flourished even if the things or persons they denoted sometimes did not. The "forgotten man", however, was first used by Professor William Graham Sumner of Yale. Perhaps it is merely a transference of terms, for, if I remember Billy Sumner's lectures correctly, his "forgotten man" was a hard-working self-supporting fellow.

Other categories are slang, the argot of industry, expletives, pejoratives for races, words with different meanings in England and the United States, those which are innocuous in one country and obscene in the other, and many more.[6] Of none does Mr. Mencken write with more gusto than of those that deal with food and drink. I have been enlightened as to why my favorite clam is called a quahog, and am taught not only the derivation but the composition of burgoo. Only about that delicious delicacy, creme vichyssoise, is he strangely reticent. I suspect him of hoarding a secret recipe which he is reluctant to reveal. About nothing is he more precise than as to the method of concocting a julep in "Kentucky and its spiritual dependencies" and one that is indigenous to "the Maryland Free State". His favorite mixologists are among the biographees in the thumbnail sketches which enliven his footnotes. Nowhere does he display a greater wealth of learning than on the many pages devoted to "cocktail" and its antecedents. Perhaps as evidence of his qualifications to deal with the subject he modestly admits that he himself has invented nine and that eleven have been named for him.

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1. The National Banking Act and the Federal Reserve Act both use much of the English nomenclature.

2. In the English courts a witness stands in the witness box while testifying. I once remarked to a barrister friend that this seemed a hardship when the testimony was protracted. His reply was: "Why should they have an advantage over us? We stand."

3. Mr. Mencken mentions "strike" meaning "a form of legislative blackmail", but he does not refer to the allied expressions "strike suit" and "strike value" of a claim. See Second Preliminary Draft of Amendments to Rules of Civil Procedure, pages 28-42.

4. Not a few of these terms are obsolete; e. g., Salt River. In one of his many amusing notes Mr. Mencken traces "up Salt River" to Henry Clay's campaign against Jackson in 1832. Salt River in Kentucky is a branch of the Ohio. Clay engaged a boatman to row him up the Ohio to Louisville where he was to speak. The boatman, a Jackson partisan, rowed him up Salt River instead, and he missed his engagement.

5. The Judicial Committee of the Privy Council in a case that arose in Burma has formally held that O. K. upon a legal document meant that the details contained were correctly given.

6. Mr. Mencken is delightfully discursive. He lists the nicknames that have been bestowed upon the presidents and other prominent politicos, and attributes to each the expressions to which he gave currency. The proper use of honorifics, both in this country and Britain, is meticulously set forth and the Style Manual of the State Department included. For some reason that is not apparent, the Production Code of the moving picture industry is printed in full.

Only in the choice of one drink does Mr. Mencken find something English superior to things American. He prefers their ginger beer to our ginger ale. He fiercely resents the hostility of a certain class of Englishmen to Americanisms, and attributes this to what he concedes to be their antipathy toward all things American save "when the Hun is at the gate."

Many of the instances cited are from newspaper stories of trials. A witness was reprimanded for saying that something had been "pinched"; another, for styling himself an "automobile engineer"; a third, for using "definitely" as an emphatic. Barristers have been mildly rebuked for using in argument such expressions as "to bluff", "to kill time", "an agreement was reached". Mr. Justice Clauson, sitting in the Chancery Division, pretended to be baffled by "sez you", as used in a poem by Osbert Sitwell. Mr. Justice Merriman, in the Divorce Division, when startled by "hangover", remarked: "I won't yield to the temptation of asking what it is."

Mr. Mencken takes this kind of thing too seriously. Perhaps he does not realize that, notwithstanding the many admirable qualities of modern British justice, a cruel form of judicial tyranny persists. Some English judges have a strange penchant for perpetrating indifferent jokes at which counsel, litigants and jurors are constrained at least to smile.[7]

Many Englishmen, as Mr. Mencken admits, are much interested in the American language and are fond of using American expressions. Sir William Craigie, editor of the *Dictionary of American English,* is an Englishman. No one is more sympathetic with American speechways than Professor D. W. Brogan of Cambridge University. Neville Chamberlain and Stanley Baldwin often used Americanisms. Winston Churchill, although he clings to the "public school accent", lards his discourses with many American terms.

Despite some opposition, Americanisms are making unprecedented headway in Britain. Especially since the vogue of the talkies they enter at a low level and work up. Briticisms are not so easily transplanted over here. A few—"snack-bar", "brunch", "sorry" for excuse me—are generally accepted, but most are affected only by the self-styled cognoscenti.

For many years American writers shared with their British opposite numbers a dislike of the new coinage. The American language first flowered in the writings of Mark Twain, and Billy Phelps was the first critic who, in 1910, seated him above the salt. Perhaps it is just as well that some sanitation be practiced; otherwise the debilitating jargon of *Time* or even of *Variety* might become endemic.

The Supplement contains much of value as well as of interest for lawyers. While denying that our entire work, as some laymen seem to think, is a logomachy, we must recognize that much of it consists of the communication of ideas. Our performance of this function has not escaped just criticism. Our style is not invariably exact and luminous. We have not always correctly appraised and exemplified the qualities of precision, clarity, appropriateness, succinctness, and raciness.

The cardinal virtues of precision and clarity need no evangelism. But in preaching the gospel of the others the missionaries will find full employment. The language of judicial opinions and of the more formal parts of a brief is one thing; that of informal writing and argument, quite another. It is arguable that the ideal of the judicial style is the same as that of science—simplicity of structure with words used with exact denotations and never with varying connotations. Justice Cardozo had an unsurpassed literary style, but one of those who followed him on the New York Court of Appeals is my authority for the statement that they sometimes had great difficulty in determining from his opinions precisely what had been decided. To impose this limitation, however, is not to reject the counsel of Thomas Jefferson: "Judicious neology can only give strength and copiousness to language, and enable it to be the vehicle of new ideas."[8] Moreover a neologism may make for succinctness. Indeed, according to Dr. Robert C. Pooley, that is one of its functions: "If a new word or a new phrase carries with it a freshness of meaning or a short cut to communication it is a desirable addition to our tongue." Justices Owen J. Roberts and Frank Murphy were therefore well within bounds when in opinions the one used "servicing"[9] and the other "publicize".[10] So also was Chief Justice Hughes when, not in an opinion but in a brief welcome to the American Law Institute, he used "yes-man" and "joy ride", and "human" as a noun.

Most popular American writers conform to Mr. Mencken's standards. They write with a colloquial ease in an essentially national idiom, taking as their source the pungent, iconoclastic everyday speech of the American people.

It is in our own profession that there is "a linguistic lag". We do not always produce racy, swift and vivid prose. One way to do this, as all of Mr. Mencken's books emphasize—perhaps overemphasize—is to season our writings with "the pungent herbs of the vernacular."

WALTER P. ARMSTRONG
Memphis, Tenn.

THE BIG THREE: UNITED STATES, BRITAIN, RUSSIA. *By David J. Dallin. 1945. New Haven: Yale University Press. $2.75. 292 Pages.*

Mr. Dallin begins his discourse with a pious statement: namely, "There shall not, there must not, be a Third World War. The piled-up corpses of those who died in this war already reach the sky. Of ruins we have enough. Of misery we have

7. Lord Darling was a great offender but many of his witticisms had the merit of cleverness.

8. Jefferson launched "breadstuff", "to give a curse", "to belittle", and other neologisms.

9. *New York, New Haven & H. R.R. Co. v. Bezue,* 284 U. S. 604, 52 S. Ct. 24, 76 L. ed. 517 (Jan. 25, 1932).

10. *Thornhill v. State of Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (April 2, 1940).

more than one generation can endure." (p.v).

Oddly enough, Mr. Dallin concludes his monograph with an equally categorical but pessimistic note:

> There is nothing, therefore, in the history of American-Russian relations which in itself can be reassuring for the future. There can be no automatic adjustment and readjustment of their interests. There is no cure-all for possible conflict. Everything depends on the political course voluntarily chosen by the two nations: in the old world—in the heart of Europe; in the new sphere of conflicts—in China, Korea and Japan; and in the third sore spot of world politics—in the Middle East. (p.269)

Between the opening and the concluding paragraphs, Mr. Dallin records an array of evidence, which is far from being concrete, to substantiate his predilections that World War III is almost inevitable. His argument is that freedom is no absolute remedy against war-like tendencies, but lack of freedom promotes the growth of the martial spirit. Consequently, since the Soviet Union is dominated by an absolute dictatorship, it follows, therefore, that World War III must necessarily ensue. He further contends that everything appears to move in the direction of an Anglo-American rapprochement and a widening of the gap separating America and Britain from the present Soviet leadership—unless a new combination, growing out of interests in the Far East, should temporarily revive the wartime coalition.

This book is less tendentious and less viciously critical of Soviet foreign policy than his previously published two books—*Russia and Post-War Europe* and *The Real Soviet Russia*. His first book, *Soviet Russia's Foreign Policy*, 1939-42, is by all odds the only volume of the four that he has published in this country which can lay some claim to a scholarly approach and objective research. It is to be regretted that a man of Mr. Dallin's massive fund of knowledge about Soviet Russia and mature intellectual growth are not directed through scholarly channels in the expectation of making a positive contribution to our thinking about the new constellation of power politics. Instead, he sees nothing but sinister motives, ruthless predatory action and preparation for another war, on the part of the present Soviet leaders. It seems also that this anti-Soviet bias has become a mania with him, so much so, that because of the trees he cannot see the forest.

This characteristic is in all probability responsible for his conclusion that "The strongest state of Europe is the chief enemy of Britain. It must be fought without respite. Periods of peace are periods of preparation for wars against Britain. The enemies of the strongest state are Britain's friends; the successes of the strongest state are Britain's sorrows; its misfortunes, Britain's fortune. This maxim is more valid today than ever." (p. 51)

For some inexplicable reason, Mr. Dallin does not cite chapter and verse of recent Russian documents nor statements made by Soviet spokesmen who are *now* in policy-making positions. Therefore, the reader has to accept Mr. Dallin's appraisal of the Kremlin's course of action at its face value. The few Russian sources which Mr. Dallin does cite are almost all statements published prior to 1940. Accordingly, a discriminating student of current affairs could readily discount a great deal of Mr. Dallin's analysis and conclusions if for no other reason than that some things have occurred between August, 1939, and August, 1945, in the arena of world power politics.

Insofar as the position of the United States in world affairs is concerned during the next year or two, Mr. Dallin is of the opinion that we face two evils: Great Britain and the Soviet Union.

According to Mr. Dallin, it is in the very nature of things that eventually the United States Government will have to choose the lesser of the two evils and align itself with Great Britain and the two together will constitute a coalition ostensibly against the Soviet Union.

The author summarizes the generally known factors that have been at play in the alleged and real conflict of interests between the United Kingdom and the United States. Similarly, he reiterates his arguments that everything that the present Soviet Government is doing in the fields of domestic and foreign affairs are seething with danger and sooner or later will sharpen the conflict of interests between the United States and the United Kingdom, on the one hand, and the Soviet Union on the other.

Chapter V bears the title "Objectives and Aims of Soviet Policy." However, if the reader is not already familiar with the aims and objectives of Soviet Russia's foreign policy he certainly will not be enlightened by this chapter; other than the report that the Soviets have been prodigiously active during the past decade in building a great and powerful Red Navy. Mr. Dallin resents the idea of the Soviet Government building a powerful navy. His argument is that Russia can be safe without being a first-class sea power; "but if she chooses to enter the naval competition and should aim to rise to front rank among the sea powers, she will have to look for the solution, in her favor, of controversial territorial problems of the highest complexity, in the sorest spots of world politics." (p. 104)

Mr. Dallin could be forgiven for not mentioning in this book the impact of the atomic bomb on the interplay of power politics within and among the Big Three. But for some inexplicable reason the author failed even to mention the importance of air power in the new constellation of Great Powers. He has also failed to take account of deeply embedded psychological factors that in the long run have exercised great influence in the shaping of foreign policy in the United States, in Great Britain and, to a lesser degree, in the Soviet Union. Mr. Dallin postulates his thesis on the assumption that even in the long run, people in the United States and in Great Britain do not have any voice in the shaping and execution of foreign policy.

In his two previously published books, Mr. Dallin has established himself as the outstanding biased critic of the Soviet Government under the dictatorship of Generalissimo Stalin. In his book the author further elucidates the same theme; namely, Stalin's numerous political concessions made and then retracted during the last two decades evidence his skill as a master of politics. It is thus obvious to Mr. Dalin that the policy of the Soviet Government during the years 1923-1933, when the force in the hands of the other powers was overwhelming, was a policy of peace. Undoubtedly he refers to the period 1933-38 when Maxim Litvinov expounded the Soviet concept of collective security as the outstanding means to prevent aggression. Since then, however, events have changed the shift of emphasis so much so that the Soviet Union itself has emerged as the most dominant political power in Europe and in Asia. Hence Mr. Dallin argues that great force is the most eloquent argument for peace; it speaks louder than the charters and covenants. His conclusion is therefore that "the coming period in world history will be, at best, a period of armed peace." (p. 275).

Admittedly, ours is an imperfect world but there appear to be residues of sinews of peace, or else why a United Nations Organization? But Mr. Dallin confines his analysis to the "dark" and pessimistic aspects of the immediate future. Surely, a consideration of the "bright" and positive factors working for peace would have enhanced his stature as a keen observer of current world affairs. Since social scientists deal with so many imponderable factors, the reader is at a loss to fathom the author's courage to speak with such degree of finality and in categorical terms concerning the future. The book is replete with gloomy predictions; hence it makes grim reading.

CHARLES PRINCE

Washington, D. C.

CHARTER OF THE UNITED NATIONS: *Report to The President on the Results of the San Francisco Conference. By the Chairman of the United States Delegation, the Secretary of State. 1945. Washington, D. C.: Department of State; Publication 2349; Conference Series 71. 45 cents. Pages 266.*

This report by the Honorable Edward R. Stettinius is clear, precise, and to the point. Its main theme is the comparison of the Dumbarton Oaks Proposals and the San Francisco Charter. A summary of the discussions at San Francisco, a description of the position taken by the United States delegation in these discussions, a recital of the declarations made by and understandings of that delegation—these are other chief contributions of the report. It succeeds in clarifying the meaning of various provisions of the Charter, in supplying cogent reasons for the insertion or omission of numerous amendments proposed at San Francisco, and in pointing out the interdependence of different parts of the Charter.

The United States delegation is given credit in the report for the name of the new Organization and for the beginning phrase of the Charter—"We the peoples of the United Nations." The report acknowledges also the constructive role played at San Francisco by the consultants to the United States delegation representing forty-two national organizations (including the American Bar Association), and ascribes to their initiative both the elaboration of the provisions on human rights and the novel provision allowing the Social and Economic Council to consult non-governmental organizations, both international and national. It gives the details of the stand taken by the United States delegation with respect to the proposed provisions for withdrawal from the UNO and for revision of treaties, and of the role of that delegation in the adoption of visions. The declarations made by the United States on equality of women and the traffic in opium are also included in the report. The report makes public the United States delegation's important understanding that the phrase "fundamental freedoms" includes freedom of speech and that "freedom of speech involves, in international relationships, freedom of exchange of information."

The interpretative paragraphs of the report throw light on such controversial topics as "domestic jurisdiction" (pages 42-45), "veto in the Security Council (pages 72-76), "sovereign equality" (pages 39-40), and "obligations inconsistent with the Charter" (pages 155-157).

The report defends the decision of the Conference to create what in nomenclature is a new "International Court of Justice", in place of the Permanent Court of International Justice. But it hastens to add that the new Court is "in a very real sense only a 'revised Court', a successor to the old," and it admits that there was unanimous agreement that the Permanent Court of International Justice had rendered effective service and had made an excellent record" (pages 139, 141).

The covering letter equally deserves careful reading. It shows how the four fundamental institutions of order in democratic societies—the enforcement officer, the court, the public meeting, and the center of science and knowledge—have been adapted to international needs. It expresses the belief that they "carry with them qualities of vigor and of fruitfulness which the limitations placed upon them by their new conditions cannot kill. They have behind them an historical momentum and a demonstrated usefulness which mean far more, in terms of ultimate effectiveness, than the precise legal terms by which they are established in their new environment." The letter describes the Charter as "a human document with human imperfections but with human hopes and human victory as well."

It is to be hoped that the report will be given the widest possible distribution. It is not only exhortative but also educative. In its emphasis on the close connection between

power and responsibility, it makes clear that in the world of tomorrow the old adage "might is right" will have to share the spotlight with the principle that "might is obligation" as well. The road of peace is often as tortuous as the road of war, but if the new Charter continues to be interpreted in all United Nations in the spirit of this report, mankind may enter an era of effective international cooperation. The San Francisco Conference offered the world "an instrument by which a real beginning may be made upon the work of peace." All men of good will join with Mr. Stettinius in his sincere plea that "neither we nor any other people can or should refuse participation in the common task."

LOUIS B. SOHN

Cambridge, Mass.

SIXTY MILLION JOBS. *By Henry A. Wallace. New York: Simon and Schuster (pamphlet edition—$1.00); Reynal & Hitchcock and Schuster jointly (cloth-bound edition—$2.00). September, 1945. Pages 83.*

PHILOSOPHY OF BUSINESS. *By Rupert C. Lodge. Chicago: The University of Chicago Press. August, 1945. Pages xiii, 432. $5.00.*

These two books are on the desk together at the end of vacation. Their contrast is so challenging as to tie them together, in mind. What they have in common is that neither author has or professes any actual business experience as to the things of which he writes.

Henry Wallace takes his title from the phrase which is credited with having helped to win a National election. His treatment is obviously political, at times evangelical; the emphasis is insistently on *jobs*, not *work*. On the whole, his advocacy of government-created projects to make "jobs" where private industry does not, is more restrained, perhaps more skilful or defensive, than were his earlier writings. Whether "sixty million jobs" in the United States means more or less than fulfillment of the universal phrase of "full employment" which was put into the United Nations Charter and came probably from Sir William Beveridge's program of National Socialism through "Full Employment in a Free Society", is not made clear.

Whatever the catch-phrase, the world-wide assurance of full employment—if jobs and work are meant rather than merely "chores" and a pretext for the handing out of tax proceeds to a decisive part of the electorate—has implications and consequences which the Secretary of Commerce hardly faces in this book. Can the products of "full employment" in every country be marketed except through government-cartels and through determinations, perhaps by the Economic and Social Council of the U N O, as to allocations of production, as to wages and prices, and as to poolings of profits and deficits? Essentially, all workers and all managers of businesses would have to be regimented into a government-planned and directed economy. The liberation of private enterprise to do the job, through substantial reductions in taxes which would enable free enterprise and private investment to do their utmost, is hardly contemplated. Higher wage rates without increased work or efficiency, the maintenance of price levels at the expense of the manufacturer and the retailer, and the withholding of incentives to the expansion of private production and employment, are evidently relied on to create pressures for the use of government-built plants in competition with the industries which won the battle of production in World War II.

The Wallace book seems pretty frankly a political document, as was recognized by the *New York Times* in having it reviewed by opposing partisans in the Senate of the United States. Despite its protestations, the volume is not reassuring to those who hope for the full restoration and functioning of the private enterprise system in America. Unless it is insincere, which seems unlikely from the author's personality, the disturbing features of the book stem from failure to think the practical problems through to their ultimates. Nevertheless, the philosophy of this brochure is one of the ascendant forces in America and the world today. To be understood and kept within bounds it should be read.

The same era has produced Professor Lodge's synthesis of a philosophy of modern business, which will have much fewer readers. The author is the Professor of Logic and the History of Philosophy at the University of Manitoba, in Canada. His treatment is penetrating, analytical, philosophical, yet grounded in realities. He finds that none of the ready-made frames—realism, idealism, pragmatism—is adequate for effective business activity in the modern world. He finds that "We have to turn to life for that principle of sound judgment which technique cannot give. In the past, we have looked to medieval theology, to modern science, to the all-powerful State; and we have found each of these too one-sided, too much a special interest, to serve to reunite us as a whole." He sees clearly that the balanced open-minded public spirited judgment of the modern business executive and his adjutants in law and engineering are vital to a stabilized society in which the well-being of humanity is actually promoted rather than merely talked about and agitated. His conclusion is that "Business occupies a position genuinely central and possesses a degree of universality which other activities lack. . . . We find that business experience has developed, unconsciously for the most part, the balanced judgment of the executive." Professor Lodge propounds no philosophy of reaction, but his long look ahead contemplates no adventures due to theorizing and inexperience, no discarding of the balanced judgment of the experienced executive, who advances steadily the welfare of mankind by sifting out and combining the good application of each realism, idealism, and pragmatism, in a workaday world. Such a book can win no votes.

AN INTERNATIONAL BILL OF THE RIGHTS OF MAN. *By H. A. Lauterpacht. New York: Columbia University Press. 1945. $3.00. Pages x, 230.*

Written after the Dumbarton Oaks Proposals had been issued but before the San Francisco Conference of the United Nations had been held or called, this volume brings forward a detailed and well-documented proposal for the formulation and enforcement of an International Bill of Rights. The author is the Whewell professor of international law at the University of Cambridge, a barrister-at-law, a member of Gray's Inn, and a well-known British publicist.

The great Conference finally came under the spell or sway of those who sought that the Charter should go far in establishing at least an organized international cooperation for "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (Article 1, 3; Article 13, b; see, also, the Preamble). Chapter IX ("International Economic and Social Cooperation") goes further, specifically uses the controversial term of "full employment," and seeks "solutions of international economic, social, health and related problems; and international cultural and educational cooperation." These are resounding terms, which may be defined further in an International Bill of Rights, the formulation of which will be undertaken by a Committee of the United Nations.

Professor Lauterpacht's exposition still is significant and useful, because he envisaged the problems and difficulties more realistically than did some of those who wielded facile pens in San Francisco. Although he urges that in World War II "the spiritual heritage of civilization found itself in mortal danger" because of "the denial of the rights of man as against the omnipotence of the State" and that "an international declaration and protection of the rights of man," particularly as against governments, "must be an integral part of any rational scheme of world order," he perceives that the problem "is of greater difficulty and complexity than the question of international organization conceived as an instrument for securing peace through the prohibition of war and the parallel developments in the fields of compulsory judicial settlement and international legislation." The author did not foresee the shift in emphasis which took place between Dumbarton Oaks and the final Charter; but he wrote in full realization, as to his objective, that "Touching, as it does, intimately upon the relations of the State and the individual, a subject which even in the domestic sphere is still a disputed province of jurisprudence and of the science of government, it implies a more drastic interference with the sovereignty of the State than the renunciation of war and the acceptance of the principle of compulsory judicial settlement."

The author was concerned chiefly, as the above excerpts indicate, with the need for international assurances to operate as restrictions on what *governments* may do to limit and abridge individual freedoms. The Charter swings to the affirmative side of pledging the governments to do things for their peoples, to promote their well-being and raise the standards of living throughout the world.

It is probably too early to try to forecast what controversies may spring from the Pandora's box opened by the sweeping phrases of universality put into the Charter as pledges of purpose, phrases which challenge deep-seated emotions, instincts and practices in many lands. Probably no Nation which ratifies the Charter would be willing or able to accept and put in force forthwith, for all of its own people, the full implications of the Charter's sonorous assurances of human "rights."

Even in the more advanced lands like our own, some of these things are still acutely controversial as domestic policies; in some other countries, they have hardly been heard of, much less attained. Some of the phrases are from the newer argot of collectivism; others imply that agencies of the United Nations will protect and enforce the declared rights of individuals as against the acts of their governments or the failures of their governments to protect those rights—where will such a process be begun? As to the United States, where a F E P C is resisted by patriotic legislators who voted for the Charter, and where workers are denied the right to work unless they will join and submit to Communist-controlled labor unions which the directives of government put in control of industry and of workers? As to Soviet Russia, whose record as to individual freedoms is at least controversial? As to India, with its delicate problems of races and religions? As to The Argentine, where the denial of human rights has repeatedly been denounced by our Government? As to some other countries of this hemisphere, where like denials, even recently of freedom of the press, have not evoked like denunciations? The difficulties are manifest.

The Charter had to be ratified or rejected in entirety; the enlightened judgment of mankind called strongly for acceptance; and this was wisely done. For good or for ill, the generalizations about human rights are a part of the international law of the future, backed by the suasions or mandates of the United Nations; they are potential denials or derogations of domestic self-determination. The tasks of statesmanship and adjudication will be to keep their applications evolutionary and within bounds.

Professor Lauterpacht's book will remain helpful to lawyers who wish to understand and appraise the difficulties and dangers which have to be guarded against or surmounted. He could render a vast service by resurveying the whole subject in the present tense, with the Charter and the Statute before him.

TAXABLE INCOME. *By Roswell Magill. New York: The Ronald*

Press Company. 1945. Pages viii, 491. $6.00.

This is a welcome revision of the author's 1936 treatment of income, from the point of view of the reasonings and analyses which, with many shifts, the Federal Courts, the Congress, and the Treasury Department, have followed during the thirty-two year history of the federal income tax. The objective is not to re-define income, with the *Eisner* v. *Macomber* definition destroyed by *United States* v. *Kirby Lumber Company*, but rather to assist the practitioner in the organization and evolution of his ideas. "The color of the decisions does gradually change," he says, "but the design preserves its general outlines through the years."

For background and fundamental philosophy before resorting to the tax services and their labyrinthian details, this volume is authoritative and highly useful to the practitioner, even the specialist. It bears the hallmarks of the author's competence as a professor of law at Columbia, his experience as counsel for the Treasury, and his daily work as a member of a metropolitan law firm. He is not daunted by the complexities and the flood of decisions, exasperated or biased by the instances of individual injustice and hardship, or impelled to academic speculations in an effort to spell out new standards to take the place of what the courts and the Congress have tortuously done.

THE LIMITS OF JURISPRUDENCE DEFINED. *By Jeremy Bentham. Edited by Charles Warren Everett. 1945. New York: Columbia University Press. Pages xxii, 358, with indices. $4.50.*

For legal scholars, the year 1945 has witnessed an important addition to the lore which is the background of our profession. Jeremy Bentham's *Introduction to the Principles of Morals and Legislation*, first published in the 18th Century, has commonly been regarded as one of the classic books which have most profoundly influenced the thought and action of the western world. Yet the author was so downcast about its reception that he never assembled and published the great mass of material which he had written in 1782 for a further volume.

A few years ago, Charles Warren Everett, delving in the Bentham MSS. in London, discovered that Bentham had prepared a table of contents for his Part II. With this as guide, the various chapters could be put in order. This has been done, and the present volume is the result. Its use of words and phrases has an exactness now unhappily obsolete; it is a brilliant and penetrating contribution to the history and philosophy of the law.

RES IPSA LOQUITUR: *Presumptions and Burden of Proof. By Mark Shain. Los Angeles: Parker and Company. 1945. Pages xii, 486.*

Under the wartime conditions the author has not been able to complete and publish his work as a commercial venture. A provisional edition has been sent for comment to the law schools, law libraries, and members of the judiciary. The volume targets the practical problems of the *res ipsa loquitur* doctrine in connection with the law of evidence. Associate Justice Carter of the Supreme Court of California contributes a foreword, and Ex-Judge Albert Levitt, who has taught in many law schools, writes an introduction. Although controversial at many points, Mr. Shain's exposition shows industry and thoroughness. More detailed review of his work may best await the definitive edition.

POSTWAR FISCAL REQUIREMENTS. *By Lewis H. Kimmel and Associates. 1945. Washington, D. C.: The Brookings Institution. Pages viii, 166. $2.00.*

This brochure is what its title indicates; its scope is as to federal, state and local requirements. It is the sixth in the Institution's integrated series of studies in relation to post-war reconstruction and readjustments. The surveys and financial analyses are, as usual, comprehensive, impartial and competent.

INVESTMENT COMPANIES. *By Arthur Wiesenberger. 1945. New York: Arthur Wiesenberger and Company. Pages 288, with indices. $10.*

The 1945 edition of this publication is the usual source of factual information as to investment companies, with data and opinions as to their background, management, policy, portfolio holdings, etc. Lawyers who need this kind of material in aid of advice to clients, will find it useful.

WORLD POLICING AND THE CONSTITUTION. *By James Grafton Rogers. Boston: World Peace Foundation. 1945. Pages 123. Fifty cents (cloth bound).*[1]

Jim Rogers was uniquely qualified to write this book. This former member of the Board of Editors of the JOURNAL is a learned lawyer with the enviable gift of a pungent style. As a result of study and of his experience as Assistant Secretary of State, he is thoroughly familiar both with the history and the practical aspects of our foreign policy. As some of us know, he had unusual opportunities to watch from behind the scenes many of the important diplomatic developments of World War II.

All that he writes in this brochure is in answer to a single question: What powers will the President of the United States have to employ armed force to carry out American commitments under the terms of the Charter of the United Nations?

The answer given is that the President already possesses such power in the absence of legislation, but that, if he does not, it can unquestionably be delegated to him by the Congress.

This answer is based upon a careful examination of the laconic language of the Constitution, of the few court decisions that have dealt with the subject, and of the many instances where Presidents, without protest, have exercised similar powers.

1. This review of the cloth bound edition of the book is supplementary to the brief preliminary notice of the pamphlet edition, which was published in 31 A.B.A.J. 482.

Neither the Constitution nor the cases construing them are particularly revealing. The right to consummate formal treaties is jealously guarded by requiring the Senate to consent by a two-thirds vote. We cannot be committed to a death struggle implied in total war unless Congress so "declare". Even these express restrictions are not always particularly effective. No treaty enounced the "Monroe Doctrine", the "Open Door Policy", the "Fourteen Points" or the "Good Neighbor Policy". "Congress has never declared war except as the consequence of the President's acts or recommendations. It has never refused to authorize war when requested by him." (page 45) Moreover, we have fought four wars without any declaration.[2]

The conclusions drawn as to the practical interpretation of the Constitution are not based upon these undeclared wars, but upon the more than one hundred instances where the President has used our armed forces abroad to accomplish national purposes, without reference to the Congress."[3] More than any perhaps "the Boxer hostilities were quite parallel to the sort of thing that a world league might visit on an outlaw nation." (page 59)

If Mr. Roger's assumption that our past practice fixes the construction of the Constitution is conceded, his conclusions are demonstrated with the same inevitability with which a problem in geometry is solved.

These conclusions are: The use of armed forces for international police measures does not involve a declaration of war. If there is any doubt on the point, the Congress can delegate authority to the Executive Branch, by authorizing it to proceed with the stated principles of policy.

The value of this little volume comes not alone from its timeliness in dealing with the most important problem that confronts us. It is also a model in accuracy, succinctness, clarity and readableness. It should be on the "must" list of literate Americans.

WALTER P. ARMSTRONG
Memphis, Tennessee

2. The Naval War with France of 1798; the Barbary War of 1801-05; the Second Barbary War of 1815; the Mexican Hostilities of 1914-17.

3. Many of these instances are discussed in the text and all are listed in the Appendix, which contains a chronological list of the military operations of the United States abroad from 1789 to 1945.

FEDERAL RULES

(Continued from page 500)

is now available a vast store of experience which should be utilized while its recollection is fresh on the minds of those who have acquired it.

In fairness it should be stated that one reason given for not going into this subject is the inadequacy of "the amount of time the Committee has had to devote to the proposed amendments." The Committee tentatively adds: "If it is found possible at a later time to prepare a condemnation rule in form likely to meet general approval, it will be submitted to the profession for comment."[38]

This is a rather lame exit. If a desirable rule can be formulated it should be submitted regardless of whether concurring approval of government agencies and private practitioners can be anticipated. There is no reason to believe that the Supreme Court will wait upon such unanimous approval to promulgate a meritorious rule.

The better course would be not to submit the present amendments until such a rule is drafted. This is a periodic revision and should suffice for a considerable time. Constant changes will tend to bring the Rules into disrepute.

In conclusion I confess that it seems ungracious to offer any criticism of the gratuitous, disinterested and splendidly constructive work of the Committee. The wonder is not that it has not done better but that it has done so well.

38. Second Preliminary Draft, p. 80.

NOTICE OF ANNUAL MEETING OF MEMBERS AMERICAN BAR ASSOCIATION ENDOWMENT

The annual meeting of members of the American Bar Association Endowment will be held during the week of the annual meeting of the American Bar Association, December 17-20, 1945, at the Netherland-Plaza Hotel, Cincinnati, Ohio, for the election of a member of the Board of Directors for the term of five (5) years and for the transaction of such other business as may come before the meeting. All members of the American Bar Association are members of the Endowment.

Practising lawyer's guide to the current LAW MAGAZINES

AVIATION LAW – *"Internal Consequences of International Air Regulations":* A favorable review of the accomplishments of the International Civil Aviation Conference in Chicago is given under the above-quoted title, by Dr. Erwin Seago and Victor E. Furman, of the Illinois Bar, in the June issue of *The University of Chicago Law Review* (Vol. 12—No. 4; pages 333-351). The authors commend the work of the Conference in developing a framework of uniform rules for air navigation across national boundaries, and for preserving the basic doctrines of national sovereignty. They recommend that the United States' ratification of the proposed conventions be by treaty rather than by executive agreement, to insure, under the decision in *Missouri* v. *Holland,* 252 U. S. 416 (1920), that intra-state regulation will be subordinate to the national policy. (Address: The University of Chicago Law Review, 5750 Ellis Avenue, Chicago Ill.; price for a single copy: 75 cents).

FEDERAL JURISDICTION – *"Relief in Federal Courts Against State Judgments Obtained by Fraud":* How far the Federal Courts may go in granting relief against State judgments obtained by fraud, forms the subject of a well-considered note in the June, 1945, issue of *The Yale Law Journal* (Vol. 54—No. 3; pages 687-697). Specific reference is made to the recent decision in *Griffith* v. *Bank of New York,* 147 Fed. (2d) 899 (C.C.A. 2d, 1945), characterizing the review of judgments for fraud as procedural and hence outside the scope of *Erie Railroad* v. *Tompkins.* (Address: The Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.25.)

CONSTITUTIONAL LAW—*Doctrine of Stare Decisis—"Portrait of the New Supreme Court II":* In what is called the March issue of the *Fordham Law Review* (Vol. XIV—No. 1; pages 8-36), Dean Walter B. Kennedy resumes, after a year's further observation and research, his portrayal of the present Supreme Court. His first installment was commented on in 30 A.B.A.J. 398. He does not like what has been taking place in the Court meanwhile. His present analysis points out, as its starting-point, that despite the changes in the personnel of the Court, more than half of the cases decided with full opinions during the October, 1943, Term were determined by a divided Court. Inasmuch as the body of authoritative Federal case law is derived from decisions of the Court, Dean Kennedy is disturbed by what seems to him to be the significance of the conflict at the source. One of the primary causes he finds to be the break-down of the doctrine of *stare decisis.* So he seeks the reasons for its disintegration.

His well-documented exposition of the trends of decision in the Court, fortified by quotations from the opinions of members of the Court (by no means limiting himself to Mr. Justice Roberts), leads him to agree with Dean Roscoe Pound that "much of the attack on *stare decisis* is a part of the revival of absolutism which is so prominent in political and juristic thought throughout the world". Dean Kennedy makes an impressive showing as to the utility and worth of the concept of *stare decisis,* in a free society and a constitutional system, and adds his own conclusion that "this very collapse of law has been a parallel phenomenon arriving in every instance with totalitarian and dictatorial governments".

Dean Kennedy's article is no polemic against the Court. He places the blame on many factors, and is most caustic as to the teaching of "legal realism" in many law schools. He pays his respects very trenchantly to the views expressed by more than a few professors of law, notably in the law reviews, and quotes freely from their attacks on precedent, certainty, and evolutionary change in the law. His provocative but factual discussion merits inclusion in the reading of those concerned about current trends. (Address: Fordham Law Review, 302 Broadway, New York 7, N. Y.; price for a single copy: $1.00).

CONSTITUTIONAL LAW – *"The Relation of the Militia Clause to the Constitutionality of Peacetime Compulsory Universal Military Training":* One of the heartening symptoms of our times is that legal scholars in America search out and debate spiritedly a multitude of questions of public law and basic policy

Editor's Note.

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the JOURNAL *will endeavor to supply, at a price to cover the cost plus handling and postage, a planograph or other copy of a current article.*

and that the law reviews provide a forum for such exchanges of reasoned opinions. Little, if anything, in the domain of preconceived constitutional law seems to be exempt from indefatigable inquiry and research.

A current instance is the following: The arguments for and against universality of obligatory military training in peacetime have been extensively presented, before committees of the Congress and in the press and periodicals, for many months, and intermittently over many years. If the constitutionality of the proposal has been challenged with show of authority, the issue has not bulked large in the great debate of merits. Then Professor Harrop A. Freeman of William and Mary College raised the question broadly in an incisive article on "The Constitutionality of Peacetime Conscription", in the December issue of the *Virginia Law Review* (31 Virginia Law Review 40-82). Because of the novelty and scholarship of Professor Freeman's article, it was summarized and commented on in this department last April (31 A.B.A.J. 210).

Recognizing that this was no "ivory-tower" challenge, the advocates of compulsory training rallied to meet the onslaught on its constitutionality. A brilliant rejoinder is made by W. Randolph Montgomery, of the New York Bar, in the June issue of the *Virginia Law Review* (Vol. 31—No. 3; pages 628-666). As expressed in a foreword by Archibald G. Thacher, also of the New York Bar, Mr. Montgomery "has rendered a valuable service by his thorough and scholarly examination of a most important question now confronting the American people", and is "to be commended for a clear and convincing analysis of the 'army power' and the 'military power' provisions of the Constitution."

The merits of the issue are at present for our readers and for others, but it should be said here that much thought and research into the legal background of our military policy and militia have manifestly gone into Mr. Montgomery's reply. He develops an angle which, if not entirely new, has not been stressed before; viz: That in a time of peace the "militia" or general manpower of the Nation (including the National Guard) is not of constitutional necessity a State force. Many thoughtful people, lawyers as well as laymen, on reading the "militia clause" for the first time, derive an impression that in peacetime the "militia" must be a State force. Professor Freeman argued that the framers had only the State militia in mind when they wrote the Constitution; that the Federal government could not force the general manpower of the country to undergo military training; that only the States can accomplish obligatory training; and that it was the constitutional intent to rely on a volunteer Federal army and the State militias for American military forces in time of peace.

Mr. Montgomery concedes that such were the views of many eminent authorities, in early days of the republic. The far-reaching effects of the "army powers", which the founders also wrote into the Constitution, were not then realized, nor was a need apparent then for broad construction and application of the "army powers". Mr. Montgomery maintains that these early views from which Professor Freeman's arguments originate are not to be deemed the law as it stands today. The "militia" referred to in the "militia clause" is a State force, but he argues that there is also a National force which the Federal government can organize and exclusively control under the "army power". That force is the general manpower of the Nation, or the National "militia". Mr. Montgomery contends that the National "militia" has come to be dealt with by the Congress, not as a separate body completely distinct from the standing army in the ancient "militia" concept, but as a reserve adjunct of the standing army. To avoid confusion with the State militias covered in the "militia clause", he suggests that perhaps the National Defense Act of 1916 should have referred to the "militia of the United States" by some other name than "militia". But he thinks that whatever the name under which it goes, the general manpower of the Nation will always be in fact the National "militia".

His thesis is that whereas, in the early days, it sufficed to rely on the State militias for our National defense in peacetime, today it is necessary to use the National militia. He urges that the Constitution gave the Congress the power under the "army clause" to use it. Therefore, he regards the compulsory universal military training of a segment of the National militia as constitutional, and submits that the Federalization of another segment (the National Guard of the United States), in peacetime and free of State control, would also be constitutional. Both Mr. Thacher and Mr. Montgomery stand essentially on Alexander Hamilton's declaration, quoted by the Circuit Court of Appeals in the *Lambert* case, that "We are not precluded from preparing for battle, if battle must come, until such time as our preparation would be too late."

It seems unlikely that as intrepid a scholar as Professor Freeman will let the issue stand upon this rejoinder. The issues would be vastly cleared by a reply from him. The law reviews often assist greatly the development and clarification of the law. In any event, these two exhaustive and definitive studies of a subject which not even those who have been close to it have thoroughly comprehended hitherto are commended to lawyers interested in this vital topic, especially the thousands of lawyer-soldiers who have fought and served in this war. (Address: Virginia Law Review, Charlottesville, Va.; price for a single copy of each issue: $1.25).

CONSTITUTIONAL LAW — *Taxation — "The Remnant of Intergovernmental Tax Immunities":*

The study of Supreme Court decisions on inter-governmental tax immunities, begun by Professor Thomas Reed Powell in the May issue of the *Harvard Law Review* (See 31 A.B.A.J. 383), is concluded in the July issue (Vol. LVIII—No. 6; pages 757-805). The first installment had noted that during the six terms of the Court prior to 1943, no tax had been condemned solely because of the constitutional immunity of the United States or the States. The concluding article is devoted to an analysis of the limited number of recent decisions which indicate that a "remnant" of immunity will be retained. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: 75 cents).

CONSTITUTIONAL LAW – *"Treaties and Executive Agreements —A Reply":* In the June issue of *The Yale Law Journal* (Vol. 54, No. 3; pages 616-664), Professor Edwin Borchard of The Yale Law School makes an incisive reply to the articles which Professor Myres S. McDougal and Asher Lans began in the March issue (commented on in 31 A.B.A.J. 420) and concluded in the June issue of the same publication (pages 534-615). Professor Borchard's rejoinder maintains vigorously his considered opinion that an executive agreement is not interchangeable with a treaty, and that an extension of executive agreements to matters traditionally covered by treaties is violative of the intended constitutional procedure. Since Messrs. McDougal and Lans directly attacked the views of Professor Borchard, his reply is devoted in large measure to a refutation of the basis upon which the attack was made. Despite the reflection of spirit evidently amounting to animus on both sides, this able exchange of mature opinions is probably the most complete and up-to-date compendium of the arguments *pro* and *con*, on what may become a major constitutional issue of our times. (Address: The Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.25).

COPYRIGHTS – *"Necessity of Intent for Infringement of Common-Law Copyright":* A note in the June issue of *The Yale Law Journal* (Vol. 54—No. 3; pages 697-706) discusses the recent decision of the United States Circuit Court of Appeals for the Second Circuit in *DeAcosta* v. *Brown, et al,* 146 Fed. (2d) 408, which held that intent is immaterial in actions for infringement of common-law copyright. A critical analysis is given, and the suggestion is made that the Federal Copyright Act be amended so that intent to infringe will be an element of the common-law cause of action. (Address: The Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.25).

CORPORATIONS—*"Suability of Dissolved Corporations—A Study in Interstate and Federal-State Relationships":* An article titled as above, by Philip Marcus, Special Assistant to the Attorney General, is in the May issue of the *Harvard Law Review* (Vol. LVIII—No. 5; pages 675-704). Discussing first the common law and the State statutes as to the suability of dissolved corporations, the author outlines the "interstate" and "federal-state" problems which arise upon dissolution of a corporation formerly operating in several States. It is his view that the laws of the State of incorporation should not provide the sole basis for determining the rights and liabilities of a dissolved corporation, and that a dissolved corporation should be amenable to suit in respect of criminal wrongs, as well as civil wrongs, perpetrated prior to dissolution. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: 75 cents).

INTERNATIONAL LAW—*Maintenance of the Traditional American Freedoms—"The Search for a Catalyst":* In the September issue of *The Lawyer* (Vol. 9—No. 1), Nathan Boone Williams, of the District of Columbia Bar, makes an earnest plea for "the maintenance of a world ruled by law; law which respects the rights of all men to life, liberty and honest effort and *to be let alone;* law which truly expresses the common sense of mankind." Mr. Williams is the author of "We The People"; the article expresses mainly the views which he stated in his analysis of the Preamble of the Constitution. (Address: The Lawyer, American Law Book Co., 272 Flatbush Avenue Extension, Brooklyn 1, N. Y.; no charge for a copy).

INTERNATIONAL LAW – *Trial and Punishment of War Criminals:* One of the most competent and comprehensive treatments of the legal bases for proceedings against the Axis war criminals is contributed to the *American Journal of International Law* (Vol. 39—No. 2; pages 257-285), by Professor Quincy Wright, of the University of Chicago Law School. His well-documented conclusions on this subject of growing importance and public interest are that "Four systems of law—National law, the law of war, the law of peace, and world law—may be utilized to punish 'war criminals'," and that while each has some advantages and disadvantages for the purpose, there is "no reason for confining prosecutions to any one of these systems of law" when "parallel use of several" is available. (Address: American Journal of International Law, 700 Jackson Place, N.W., Washington 6, D. C.; price for a single copy: $1.50).

LABOR LAW—*Wage and Salary Stabilization—"Aspects of Wage Sta-*

bilization by the National War Labor Board": President Truman's postwar wage policy (Executive Order 9599) has swept aside many of the limitations upon wage increases which had been based on Executive Orders Nos. 9017 and 9250. An informative article in the *Michigan Law Review* (Vol. 43—No. 6; pages 1007-1204), by David Haber, deals with the governmental control of wages under Order No. 9250. To those interested in the workings of such a control in wartime, this article will be valuable as an analytical and penetrating study. Insofar as WLB standards and policies will effectuate the policy of Executive Order No. 9599 or have become a part of the fabric of prospective wage structures and collective bargaining negotiations, the article will prove useful also to attorneys dealing with such matters. (Address: Michigan Law Review, Ann Harbor, Mich.; price for a single copy: $1.00).

PHYSICIANS AND SURGEONS —*"Some Liabilities of the Physician in the Use of Drugs":* An informative summary of the extent of a physician's liability for malpractice, especially in the administration of drugs, is made available in an article by William R. Arthur, Professor of Law in the University of Colorado, in the June issue of *The Rocky Mountain Law Review* (Vol. 17 — Nos. 2 and 3; pages 131-162). After reviewing some of the ancient practices of physicians and the restraints imposed by various legal systems, the author presents a classified digest of present-day decisions by American courts. The article is interesting in its summations of the facts of particular cases and of the amounts of damages assessed. (Address: The Rocky Mountain Law Review, University of Colorado School of Law, Boulder, Colo.; price for a single copy: $1.00).

PRACTICE AND PROCEDURE —*"Current Developments in Pleading, Practice and Procedure in the New York Courts":* Harold R. Medina, teacher of law and expert in procedure, outlines in the June issue of the *Cornell Law Quarterly* (Vol. XXX—No. 4; pages 449-465) the more significant statutory changes in New York procedure during the last two years. Although primarily of value to New York attorneys, his exposition will be of interest in other jurisdictions, for comparative purposes. Among other things, Mr. Medina discusses the general revision of the New York Rules of Civil Practice applicable to motions addressed to pleadings, the recent New York decisions involving the admissibility in evidence of hospital records, the addition of a new Section to the New York Civil Practice Act to provide for judicial notice of matters of law in the Court's discretion, and the clarification of the Statute of Limitations sections in the New York Civil Practice Act as to non-residents and foreign causes of action. Concerning procedural changes generally, Mr. Medina makes the following cogent remark at the conclusion of his article: "Fortunately, there is now, and has been for some years, an increasing demand for placing the rules of procedure under the control and supervision of the Court of Appeals. This is where the power to make such rules should reside. The experience with the Federal Rules of Civil Procedure, adopted by the Supreme Court after the most careful and exhaustive study, and then at infrequent intervals amended in an orderly and systematic fashion, is a most valuable and reassuring guide." (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00).

PROCEDURE —*"Jurisdiction by Implied Consent":* From foreign corporations to non-resident motorists and sellers of securities, the jurisdiction-by-implied-consent theory has been extended until the remaining logical step is frank recognition of a principle that the doing of an act in a State confers upon that State jurisdiction *in personam* to require compensation for any harm resulting from such an act. The leading cases demonstrating this extension are analyzed in an article under the above title in the Summer issue of the *Marquette Law Review* (Vol. XXIX—No. 1; pages 31-47), by Dr. Jane Mary O'Melia of the Wisconsin Bar. On the basis of a comprehensive analysis of the pertinent constitutional provisions, she concludes that "Given a need for providing a method of reaching absent non-residents, a statute authorizing service of process upon a statutory agent is an appropriate means to fulfill this need. In the exercise of its police power, a state may enact such a statute, sustainable under the Constitution." (Address: Marquette Law Review, Milwaukee, Wis.; price for a single copy: $1.00).

WILLS — *Charitable Bequests — "The Legal Definition of Charity":* American lawyers who have occasion to brief the nature of a charitable bequest will be interested in a summary of the English case law on the subject as contained in an article by J. W. Brunyate, in the July issue of *The Law Quarterly Review* (Vol. 61—July, 1945; pages 268-285). The author characterizes these decisions as "a jungle and a wilderness". Nevertheless, he succeeds, on the basis of his own analysis, in reducing the decisions in the leading cases to a suggested judicial redefinition of charity, which he believes, would aid the draftsmen of wills in avoiding the artless use of language. (Address: The Law Quarterly Review, The Carswell Co., Limited, Toronto, Canada; price for a single copy: $1.75).

London Letter

Returning Barristers

Now that members of the Bar are returning from active service with the forces, the anticipated housing problem is already becoming acute, and the General Council of the Bar, in an endeavour to assist, has sent out an appeal to those who have accommodation to spare to be as helpful as possible in this respect, even at some personal inconvenience, since, owing to the damage by enemy action in the Inns of Court, it will be a very long time before it is possible to obtain accommodation on the pre-war scale. A register of available accommodations will be kept by the Bar Council, and returning members of the Bar are invited to communicate with the Secretary, stating the date of their return, together with their addresses and telephone numbers. A list of such barristers will be compiled and will be open for inspection at the Council's offices. Owing to the special circumstances of the war the Bar Council have decided that, as an exception from the normal rules, it shall be permissible for a barrister returning to practice after whole time war service to send a notice to those who were his clients at the time his war service began that his service is completed and that he has returned to practice. A form of notice has been approved by the Council and an offer made, to those who wish to take advantage of it, to send such notice to those clients to whom the barrister is permitted to send it.

United States Lawyers as Pupils

The General Council of the Bar and the Council of the Law Society have been requested by the United States Forces' Command to obtain facilities for the reception in Barristers' Chambers and Solicitors Offices of lawyer members of their forces in this country as "Observer Pupils" for short periods. Both Councils have agreed to cooperate in the scheme (as other professions are doing) in spite of the difficulties which are already being experienced with regard to accommodation, and have appealed to the Bar and Solicitors to give it the support required. These American Forces' lawyers will be in chambers or offices in the position of "observer pupils" with a seat or desk, will study procedure in court and attend such lectures outside chambers as they may desire, for a period of from four to six weeks from October 15. (without fee). It is generally agreed that the scheme is a good one. American lawyers will be enabled to acquire some knowledge of English legal procedure and practice, and there is no doubt that such arrangements will further strengthen the ties of friendship which have been formed between the citizens of our respective countries during the war, and be of material assistance in re-establishing the rule of law in our present topsy-turvy world.

Presentation to the Bar Librarian

On Thursday, July 26, 1945, the Bar Library in the Royal Courts of Justice was the scene of a very interesting event, when the Bench and Bar were present to pay tribute to Mr. R. A. Riches, the Librarian, on his completion of fifty years' service. He was appointed Assistant Librarian to his father in 1895 and became Librarian on his father's retirement in 1917. As a mark of appreciation a cheque, subscribed to by members of the profession, together with a book containing subscribers' names, was presented to Mr. Riches by the then Lord Chancellor, Viscount Simon. In making the presentation Lord Simon said that he wished to give expression to the debt of gratitude which the Bench and Bar owed to Mr. Riches for his kindness, courtesy and help over such a long period of years, and for the skill with which he had made the Library the useful instrument that it was. He called to mind Leslie Stephen's "Half Hours in a Library," and wondered if he would have made much of half an hour in this one, the particular subject-matter of which was the sort of book which came within Charles Lamb's description of "books which are no books." Its usefulness to the practising barrister, however, was undoubted. Although, he said, the Library was established primarily for the benefit of the Bar, it had become very generally used by members of the Bench. All of them were most delighted to have joined in this collection and glad to have Mr. Riches there to express their feelings of gratitude to him. Mr. Riches, in reply, expressed his gratitude to the Lord Chancellor for having come to the Library to make the presentation, and his sincere thanks for the gifts. He said it was one of the happiest moments of his life, and he hoped to continue his very pleasant duty to the best of his ability.

The New Lord Chancellor Sworn In

On Monday, July 30, 1945, the new Lord Chancellor, Sir William Jowitt was sworn in in the Appeal Court in the Royal Courts of Justice, in the presence of Lord Greene, Master of the Rolls (who presided) and the High Court Judges present in the building. The Court was filled to capacity by members of the Bar and others, but the ceremony itself was almost disappointing in its simplicity. At 2:15 p.m. the usher called for silence in Court, and those present rose as the Master of the Rolls and the Judges entered. After a very short interval Sir William, preceded by the mace, took his place next to Lord Greene and, with the Testament held in his right hand, took the oath of allegiance and the Judicial Oath as Lord Chancellor. It was ordered that a record of the event be

made in the State Archives, and the ceremony was at an end. Even for this undemonstrative country the proceedings, although conducted with proper solemnity, seemed to lack that pomp and circumstance which would more fittingly attend such an important occasion. The Lord High Chancellor of Great Britain (to give him his full title) fills the oldest and most dignified of the great mediaeval offices of the Crown. He takes precedence of all Dukes, except such as happen to be the King's son, brother, uncle or nephew, or the King's brothers' or sisters' sons. He is the head and first representative of the law in England. This being so, one is inclined to feel that proper notice of the time and place of the event might have been given to the profession (only a comparative few knew of it) and that a more fitting venue would have been the Great Hall of the Royal Courts of Justice.

Sir William Jowitt was admitted to the Middle Temple on November 15, 1906, and called to the Bar on June 23, 1909. He took silk in 1922, and was appointed to the Bench of his Inn on April 25, 1929. He joined the Labor Party in 1929, after the General Election in that year, and was appointed Attorney General. He was Solicitor General from 1940 to 1942, and was later Paymaster General, Minister without Portfolio, and Minister of National Insurance. On August 2, the King conferred upon him the dignity of a Barony of the United Kingdom by the name, style and title of Baron Jowitt, of Stevenage in the County of Hertford.

Viscount Finlay

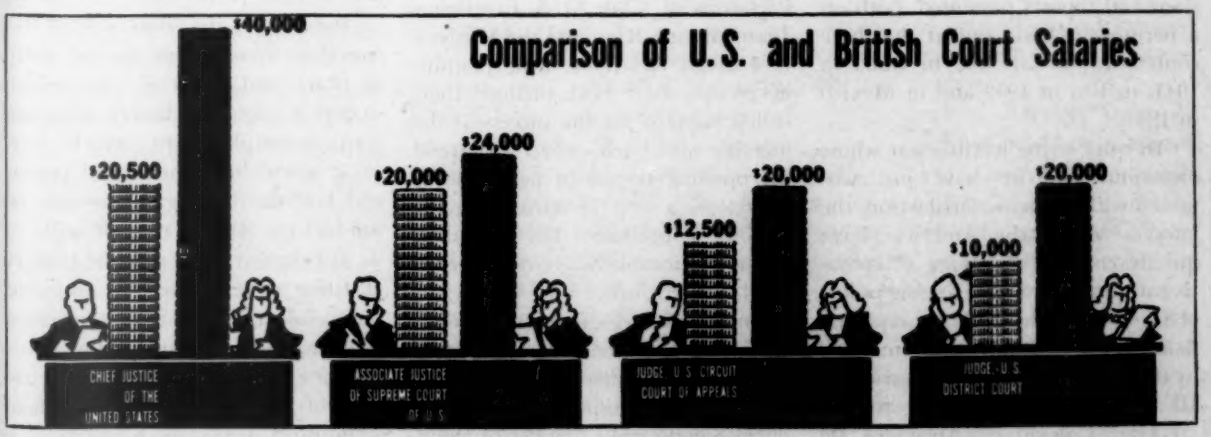
It is with much regret that I note the death in a nursing home at Redhill, Surrey, on the 30th June, of Viscount Finlay, a Lord Justice of Appeal since 1938. He was the only son of the Rt. Hon. Robert Bannatyne Viscount Finlay of Nairn, a former Lord Chancellor. Viscount Finlay was born in 1875, educated at Eton and Trinity College, Cambridge, and admitted a student at the Middle Temple on the 30th October, 1897. He was called to the Bar on the 19th June, 1901, and quickly made a name for himself in revenue and commercial cases. He became junior counsel to the Board of Inland Revenue in 1905 and held that position till 1914, when he took silk. In 1920 he was made a K.B.E. He was appointed Commissioner of Assize in 1921, 1922 and 1924, and in the latter year was called to the Bench of his Inn, upon being appointed a Judge of the High Court. He was Lent Reader at the Middle Temple in 1933, and during his holding of that office he gave a most interesting reading on the subject of "Law in Literature." He married in 1903 Beatrice Marion, only daughter of the late Mr. E. K. Hall, of Kevin, County Nairn. There was one child of the marriage, a daughter and, therefore, the Peerage in which he succeeded his father in 1929, becomes extinct. A memorial service, attended by relatives, representatives of foreign Embassies, Judges, King's Counsel, barristers and numerous other personal friends, was held at St. Dunstan-in-the-West, Fleet Street, on the 12th July, 1945. The Rev. Dr. A. J. Macdonald officiated.

Honorary Benchers

General Dwight Eisenhower, Admiral of the Fleet Sir Andrew Cunningham and Field Marshal The Hon. Sir Harold Alexander have been elected Honorary Benchers of Lincoln's Inn. General Eisenhower thus adds another name to the long list of famous Americans who have been made Honorary Benchers of the Inns of Court. In recent years the names of Hon. Joseph Choate, Hon. William Howard Taft, Hon. John William Davis, Hon. Frank Billings Kellogg, Hon. Charles Evans Hughes, Hon. Charles Gates Dawes, Hon. Robert Worth Bingham, Hon. John G. Winant, and Franklin Delano Roosevelt are among those who have been so appointed.

S.

The Temple.



Fourth Conference of Inter-American Bar Association

by Dr. Mario Tagle-Valdes

ASSISTANT SECRETARY GENERAL FOR CHILE

TRANSLATED FROM THE SPANISH BY CARLOS M. SANDOVAL

The fourth conference of the Inter-American Bar Association will be held in Santiago, Chile, from the 20th to the 29th of October next. In my capacity as Assistant Secretary General for Chile of the Inter-American Bar Association, which organization is promoting this meeting, I desire by means of this brief article to direct an appeal to the lawyers of the entire hemisphere, urging that they be present at this session, that they submit to it their written studies on their respective specialties and that they observe the labors and remark the results of this meeting.

Work of the Association

In the few years of the Association's life, since it was founded on May 16, 1940, in Washington, D. C. it has initiated extensive work translated into profound studies, discussions and reports presented, both on a permanent basis and at the three conferences so far held in Cuba in 1941, in Rio in 1943 and in Mexico in 1944.

In spite of the terrible war whose victorious end we have just witnessed with immense satisfaction, the lawyers of all the Americas have quietly continued making comparative studies of law, exchanging points of view one with another, preparing definitive written works, and meeting in the conferences above mentioned, all with most encouraging results.

The "Colegio de Abogados De Chile" (Chilean Bar Association), a body which embraces all the lawyers of this country, has for the past few months, been working on the agenda and program for the Conference, so that its success may be at least as great as, or perhaps even greater than the previous conferences held in the sister republics above mentioned.

For the first time, the subjects have been carefully chosen in advance so that the studies to be presented and the discussions resulting therefrom may show uniformity and methodical treatment. It has been thought better to study a few subjects more or less deeply rather than to go into many subjects only superficially.

Cooperation of Chilean Authorities

All the authorities of Chile have willingly lent their enthusiastic cooperation to the conference. The President of Chile, His Excellency Juan Antonio Rios, and the Minister of Foreign Relations, Don Joaquin Fernandez, have both pledged their fullest support for the success of the meeting and both expect to attend the opening session in person so as to extend a hearty welcome to the various delegations. The President of the Honorable Supreme Court of Justice of Chile, the Honorable Humberto Trucco is enthusiastic in his support of the meeting and finally the Legislative branch, represented by the respective presidents of the Senate and Chamber of Deputies, has extended valuable cooperation, offering the Palace of the Congress as the place where the conference will take place.

Preparatory Work for Conference

The Council of the "Colegio de Abogados De Chile," (Chilean Bar Association) and the Organizing Committee of the Conference have been working for the past several months on the details of organization and it is sincerely hoped that all these efforts will bear the desired fruit through the attendance of the greatest possible number of lawyers from the Americas who will present their carefully prepared works for study and discussion by the delegates.

There could be no more propitious moment for an assemblage of lawyers. Might has been vanquished and right is reborn and arises triumphant from the ashes and desolation of war. Justice rules the world.

It behooves the lawyers of all the Americas to cooperate in the study of peace and to bend every effort so that it may be definitely achieved —an accomplishment which will come when the principles of justice and law are once again the rule of conduct for all men of good will.

It is in this spirit that the lawyers of Chile will receive and welcome their colleagues of the Americas, fully imbued with an abiding faith that law is the basis of the organization of the peoples, and of their tranquility, as it is the foundation of the rule of justice.

Tax Notes

Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, William A. Blakley, Dallas, Texas, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

Deduction of Tax Litigation Expense

One of the controversial items on the agenda of the Section's Committee on Federal Income Taxes is the deduction as a "nonbusiness expense" of expenses incurred in the preparation of tax returns and in tax controversies. Until the Supreme Court's liberal interpretation of the nonbusiness expense deduction in the *Bingham* case, the nearly unanimous trend of the courts was to deny any deduction for the cost of tax advice or litigation. The Tax Court has now opened the door to a reexamination of the entire problem. In *Howard E. Cammack*, 5 T.C. No. 52, the taxpayer had been forced to litigate his right to a deduction for a loss on worthless stock. He then sought a deduction for the cost of this litigation. Against a dissent which contended that prior decisions were being overruled, the Tax Court permitted the deduction. Despite this decision, however, clarifying legislation would seem to be in order.

Effect of Liquidation Upon Sale of Property

If a corporation has property which is to be sold at a gain, may it avoid the tax on this gain by liquidating before the sale is made? In the leading case of *Com'r.* v. *Court Holding Co.*, 324 U. S. 331, the Supreme Court indicated that the corporation may be taxable if it "negotiated" the sale, even though the contract was not completed until after the property had been transferred to the stockholders in liquidation.

The Tax Court has now decided a difficult borderline case against the taxpayer. In *Fairfield Steamship Corp.*, 5 T.C. No. 65, the taxpayer corporation owned a steamship which was salable at a profit. Its sole stockholder was another corporation which had losses sufficient to absorb that profit. Therefore, before any steps were taken to sell the ship, it was agreed that the taxpayer would be first liquidated. In the interim, a representative of the parent solicited offers, and obtained one which was ultimately accepted with only minor variations. The buyer was informed, however, that the offer could not be accepted until the parent had acquired the ship, and no contract was executed until after that time. With three dissents, the Tax Court found that the contract was in effect made while the corporation still owned the ship, and that the parent was acting as a mere conduit in the transaction. It held, therefore, that the corporation was taxable upon the gain.

Excess Profits Tax—Restoration of Abnormal Base Year Deductions

Section 711 (b) of the Code contains one type of "relief" from the normal formula for determining excess profits. It permits the restoration of "excessive" deductions to base period income, for the purpose of increasing the excess profits credit. The most difficult portion of that section is the burden upon the taxpayer to establish that the abnormality "is not a consequence of an increase in the gross income of the taxpayer in its base period or a decrease in the amount of some other deduction in its base period, and is not a consequence of a change at any time in the type, manner of operation, size, or condition of the business engaged in by the taxpayer." A few recent Tax Court decisions indicate the problems.

The "change in operation" provision was the bar in *North Carolina Equipment Co.*, T.C. Memo. Dock. 4737, C. C. H. Dec. 14,603. There, the court refused to permit the restoration of a loss on the sale of a building during the base period, where the building had been used for a one year trial of a new type of operation.

In *Iron Fireman Mfg. Co.*, 5 T.C. No. 51, the "increase in gross income" factor was fatal. The taxpayer sought to restore excessive repair costs on products which it had sold. The court found that part of this excessive cost might have been the result of an increase in gross income from sales, even though the taxpayer established that part was not. To obtain relief, the taxpayer must prove that the entire excess was attributable to other factors.

On the other hand, the taxpayer was successful in *Harvey Co.*, 5 T.C. No. 49, where the deduction in issue was a payment to an employee in settlement of his claim for commissions earned after the cancellation of his contract. The court held it immaterial that the taxpayer benefited from the settlement. Nor was it material that future expenses were eliminated by the settlement. Moreover, the court found that the payment was a consequence of differences between the parties, not a consequence of a change in "manner of operation."

These decisions are a harbinger of the flood of litigation which may be expected to develop about this provision of the law.

Pension Trusts—Effect of Abandonment

When a pension trust is submitted for approval, the Bureau is normally willing to assume that it has been created in good faith. Nevertheless, if the trust is terminated within a few years after its adoption, that fact may be evidence that the plan was not bona fide in its inception, and it may be retroactively disqualified. The Bureau has announced a severe policy in applying this rule. An ex-

ample is given of a company which inaugurated its plan at a time when it was earning exceptionally high war income, and which abandoned the plan in 1946 when it appeared that the required contribution would absorb all of its current profits. The plan is considered not bona fide, even though the management originally believed that its postwar prospects were good. The ruling warns that compliance with the "discrimination" provisions of Mim. 5717 is not even evidence of bona fides. PS No. 52 (Aug. 9, 1945).

Notice to Members of Junior Bar Conference

Notice is hereby given that at the annual meeting of the Junior Bar Conference to be held at Cincinnati on December 16, 17 and 18, there will be elected a chairman, vice chairman, and secretary, each for a term of one year, a member of the Executive Council from each of the First, Third, Fifth, Seventh, and Ninth Federal Judicial Circuits and the District of Columbia, each for a term of two years.

Pursuant to Section 4(B) of Article IV of the By-Laws, notice is hereby given that the members of the Junior Bar Conference residing in the above-named Judicial Circuits (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from their respective districts by written petition, in each case, specifying the name of the person nominated, and the office for which nominated, containing the names of at least twenty endorsers, all of whom are residents of the district of the person nominated. The petition can state briefly a biographical sketch of the background and qualifications of the candidate. It shall be submitted to the chairman, Charles S. Rhyne, 730 Jackson Place, N. W., Washington 6, D. C., not later than fifteen days prior to the day of the first session of the annual meeting. At the first session of the annual meeting the chairman of the Conference shall deliver to the chairman of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its Council nominees at the same time and place, and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for officers. The election of the Council members shall take place at the same time and place, and in the same manner as the election of officers, immediately following the conclusion of the second general session of the annual meeting, and shall be by written ballot.

TERM OF OFFICE: The term of office of the officers elected at the next annual meeting shall begin with the adjournment of the said annual meeting and end with the adjournment of the annual meeting to be held in 1946, or until their successors shall be elected and qualify, and the term of office of the Council members from the First, Third, Fifth, Seventh and Ninth Federal Judicial Circuits and the District of Columbia shall begin with the adjournment of the 1945 annual meeting, and end with the adjournment of the annual meeting to be held in 1947, or until their successors shall be elected and qualify.

ELIGIBILITY: No person shall be elected as an officer or member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the conclusion of the annual meeting in the calendar year within which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a member of the Executive Council if he is then a member of the Council and has been such a member for a period of three years or more.

PLACE AND DATE: The annual meeting of the Junior Bar Conference of the American Bar Association will be held in Cincinnati, Ohio, beginning December 16. Full plans for the meeting will be forwarded to all members of the Conference within a few days.

T. JULIAN SKINNER, JR., *Secretary,*
Junior Bar Conference of the American Bar Association.

Junior Bar Notes

by T. Julian Skinner, Jr., SECRETARY JUNIOR BAR CONFERENCE

Cessation of war is welcome to all of us for many reasons. To the Junior Bar Conference it means increased activity.

During the four years that our government has found it necessary to draft young men for military and naval service, many young lawyers have answered the call to arms. As those young men entered the armed forces, it became more difficult for junior bar organizations to function satisfactorily. In the main they continued to do so, however, and now that members of the armed forces are being released as rapidly as conditions will permit, junior bar activities undoubtedly will be greatly stimulated. As our boys are released and young lawyers return to practice, activity on the part of all junior bar organizations will increase.

And now that hostilities are at an end, those young men of the bar who remained at home because of physical reasons, family responsibilities, essential work, or other reasons, may justly take pride in the fact that they preserved the junior bar units intact and reasonably active until such time as the lawyer veterans can rejoin them with all moving forward together in carrying on bar work. Thus, those at home made certain that bar activity would not stagnate.

Aid for Lawyer-Veterans

The Junior Bar Conference of the American Bar Association and its affiliated local and state units recognized that a heavy obligation rested on the organized bar to formulate means of aiding returning lawyer veterans. Under the able direction of Lyman M. Tondel, Jr., of New York City, a member of the Conference's Executive Council, the Conference has devised definite and tangible methods of rendering such aid. These plans have been made available for use by all state and local bar groups, since to be effective bar assistance to veterans must necessarily be rendered on a local rather than national basis. With the end of war most junior bar organizations find that their machinery has already been set up to meet the calls of veterans for aid and undoubtedly the remainder will fall in line at once. Thus, the organized junior bar is meeting its obligation to its fellow lawyers—the returning veterans.

This work is an important work and it by no means has been confined to junior bar units. The organized bar as a whole has recognized the necessity of meeting the situation. The American Bar Association as an entity has had committees which have been and will continue to be of great service to the veterans. It is with those committees that the Junior Bar Conference has cooperated. The Conference realizes that the work which its Committee on War Readjustment has done respecting aiding veterans has been directly related to the work performed by other committees of the Association.

When one thinks of the struggles through which all junior bar groups have moved during the last four years, our thoughts turn to men who have shouldered the responsibility of maintaining a reasonable amount of junior bar activity throughout the nation. Those are the men who served as National Chairmen of the Junior Bar Conference of the American Bar Association during that period of time—a period which is about to end but which will not be fully terminated until the veterans generally have been returned. When young men began to be drafted on a substantial scale Philip H. Lewis of Topeka, Kansas, now a naval officer, was serving as Chairman. Joseph D. Calhoun of Media, Pennsylvania, followed him, and James P. Economos of Chicago, Illinois, served next. All were experienced in bar work as their successful administrations indicate. Charles S. Rhyne of Washington, D. C., the present Chairman, assumed the office at the fall meeting in 1944 and although the war has ended during his term many problems of organization will continue to confront him and his successor as well. The Conference is indebted to these men for the service rendered by them during these trying times.

New Officers of Local Groups

Edward A. Beard recently succeeded J. Edward Bindman (a member of the Conference's Executive Council) as Chairman of the Junior Bar Section of the Bar Association of the District of Columbia. Lee F. Dante and Sidney S. Sachs (Editor of The Young Lawyer) are Vice Chairman and Secretary-Treasurer, respectively, of the organization. The group is engaged in numerous activities respecting rehabilitation of lawyer veterans and relations with the public.

The personnel of the Committee on the Junior Bar of the Bar Association of the City of Boston was recently enlarged. John Rogerson is Chairman.

Membership Committee

Lawyers generally are interested in bar associaion work but even so active solicitation is necessary if adequate membership in a voluntary bar association is to be maintained. It is with that in view that the Conference's Membership Committee has cooperated with the American Bar Association's committee on the matter in obtaining new members

for the Association.

Returning lawyer veterans need the benefits which are derived from membership in bar associations and at the same time usually recognize their obligation as attorneys to improve the administration of justice through organized bar work. Nevertheless, the veterans often are so concerned with becoming readjusted generally that they overlook becoming affiliated with the bar associations unless they are approached on the subject. With those principles in view, the Membership Committee of the Junior Bar Conference is actively undertaking to interest lawyer veterans in the work of the American Bar Association. Ray Nyemaster, Jr. of Des Moines, Iowa, Vice-Chairman of the Conference, is chairman of the committee.

Committee in Aid of the Small Litigant

The Committee in Aid of the Small Litigant with K. Thomas Evengram of Denton, Maryland, as chairman, reports that the survey of administration of justice in justice of the peace courts has been completed and that the data is being compiled. The sub-committee on surveys of personal finance or small loan conditions states that the survey conducted in Alabama is being placed in the form of a written report. Surveys were completed in the past in Oklahoma and Kansas with written reports prepared and distributed. As a result, certain improvement in conditions is said to have resulted in those states.

Quincy H. Hale

Officers of the State Bar Association of Wisconsin for the year 1945-46 are: President, Quincy H. Hale, of La Crosse; President-elect, John S. Sprowls, of Superior; and Gilson G. Glasier, of Madison, Secretary and Treasurer. Mr. Hale and Edmund B. Shea of Milwaukee, were elected delegates to the House of Delegates of the American Bar Association for the term ending with the 1946 annual meeting.

James P. Economos of Chicago, Illinois, Secretary of the Traffic Court Committee, and last retiring chairman of the Conference, indicates that district traffic court conferences are being held in numerous states with excellent results. With the relaxation of governmental restrictions on travel, state and district traffic court conferences should increase in number.

The application of the Cincinnati Junior Bar Group of the Cincinnati (Ohio) Bar Association for affiliation with the Junior Bar Conference of the American Bar Association was approved by the Executive Council. An application for affiliation filed by The Barristers' Club of San Francisco (California) is pending before the Executive Council.

Charles S. Rhyne of Washington, D. C., National Chairman of the

Conference, recently attended the annual convention of the Canadian Bar Association in Montreal. He informed the Canadians of Conference work in the United States and stimulated interest in the creation of a Junior Bar Section in the Inter-American Bar Association.

The Young Lawyers' Section of the Indiana Bar Association recently chose John E. Early of Evansville as chairman. He succeeds Walter B. Keaton of Rushville. The vice chairman and secretary are Bruce H. Johnson and John W. Houghton, both of Indianapolis.

Letter to the Editors

To the Editors:

Two things in your very excellent July issue particularly impressed me. The first was the cover quotation of General Jan Smuts:

> We are here mightily resolved that hereafter the use of force and the making of war shall be solely the function of the Community of Nations, and shall be resorted to only to keep the peace and maintain justice.

To make war to keep the peace—what a bitter contradiction of terms! In the face of this realistic if poetic appraisal, how shall anyone dare for a moment to place his trust in the United Nations Charter as a final instrument of peace? How shall anyone dare for one moment to cease his struggle for the attainment of an organization through which man may at least hope to build a positive peace for the coming generations, a peace founded on law, rather than "the making of war"?

General Smuts with unusual insight recognizes that in the last analysis war is the only "writ" by which a rule of conduct can be enforced upon a nation as a unit. So it is that any league system by necessary implication institutionalizes war.

But the hope for survival is found in President David A. Simmons' report. The Charter, he says, "does not end war... There will be an end of wars when mankind has progressed to the point that inherited tendencies toward violence are controlled either through self-restraint or *through restraint imposed by some world government yet to be devised.*"

I see little hope in the first alternative. Neither evolution nor two thousand years of Christianity have made any perceptible progress in teaching man self-restraint. But governments have, through law, successfully restrained the aggressiveness of individuals since the dawn of history.

Here, then, is the secret of peace: Enforcement of law upon the individual, rather than threat of war against the nation.

And in the end we must realize, as President Simmons has intimated, that there can be no peace without Justice, no justice without law, and no law without government to make, interpret and enforce law. When the Bar as a whole has faced the implications of this self-evident truth, we shall be ready to lead the world's peoples to the peace without which civilization cannot endure in a world of atom bombs. Until then we lawyers are merely "kidding" ourselves and our clients.

Let us work to speed the day. It is later than we think.

PAUL THATCHER.

Ogden, Utah

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